Supreme Court, U.S.
FILED
031594 MAY 24 2004
OFFICE OF THE CLERK

No. (2)

IN THE

Supreme Court of the United States

RICHARD J. ANGELICO, M.D.

Petitioner

V.

LEHIGH VALLEY HOSPITAL, INC.

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Richard J. Angelico, MD
Petitioner, Pro Se
2021 Weyhill Drive
Center Valley, PA 18034
(610) 838-2287

QUESTIONS PRESENTED FOR REVIEW

The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 – 11152, "HCQIA," created the National Practitioners Data Bank as a repository for adverse reports on physician professional misconduct. The Act provides for a presumption of immunity from monetary damages on participants in medical peer-review provided certain due process requirements have been met and provided the findings, if adverse to the physician, are reported to the Data Bank.

The questions to be considered are:

1. May a District Court properly withhold from jury consideration whether or not a Data Bank entry was properly determined by a peer-review process and then subsequent to trial decide the issue by granting the peer-review body immunity under HCQIA on post-trial motion?

2. Should this Court settle the controversy among the Courts of Appeals as to whether or not
   a) immunity under HCQIA is a matter of law which "under no circumstances should be put to a jury?"
   b) HCQIA affords "immunity from suit?"

PARTIES TO THE PROCEEDINGS

This case involves a controversy between Petitioner, Richard J. Angelico, MD and Respondent, Lehigh Valley Hospital, Inc.

Certiorari is not sought on matters between petitioner and the additional defendants/appellees appearing in the original caption in the Court below with whom issues have been finalized.

RULE 29.6 STATEMENT

Petitioner is not incorporated.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW I
PARTIES TO THE PROCEEDINGS II
RULE 29.6 STATEMENT II
TABLE OF CONTENTS III
TABLE OF AUTHORITIES V
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
Statement...2 REAPPLICATION AT LEHIGH VALLEY HOSPITAL 4
ANGELICO V. ST. LUKE'S HOSPITAL 5
TOONDER COURT DISCOVERY 6
MEDICAL EXECUTIVE COMMITTEE JUNE 6, 1995 7
THE FAIR HEARING 8
PROCEEDINGS IN THE COURT BELOW 8
REASONS FOR ISSUING THE WRIT 11
I. WHILE IMMUNITY IS A QUESTION OF LAW, WHETHER THE REQUIREMENTS FOR IMMUNITY UNDER HCQIA HAVE BEEN MET IS A QUESTION OF FACT WHICH SHOULD NOT BE WITHHELD FROM JURY CONSIDERATION 11
II. HAVING WITHHELD FROM JURY CONSIDERATION WHETHER THE DATA BANK ENTRY WAS PROPERLY DETERMINED, AND HAVING FAILED TO PROPERLY CHARGE THE JURY ON ANY OF THE FACTUAL QUESTIONS NEEDED FOR AN IMMUNITY DETERMINATION, THE DISTRICT COURT'S GRANT OF IMMUNITY ON A POST-TRIAL MOTION WAS AN ABUSE OF DISCRESSION 23
III. AS IMMUNITY UNDER HCQIA IS LIMITED TO LIABILITY DAMAGES, THE COURT BELOW HAS ERRED IN AFFIRMING THE DISTRICT COURT'S ORDER DECLARING LVH "IMMUNE FROM SUIT" 25
IV. THE GRANT OF IMMUNITY ON A POST-TRIAL MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b) IS IN

CONFLICT WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE RULE 27
V. THIS COURT SHOULD USE ITS SUPERVISORY AUTHORITY TO CLARIFY THE PROPER IMPLEMENTATION OF 42 U.S.C. §§ 11101-11152 29
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Agostini v.Felton, 521 U.S. 203; 117 S. Ct. (1997).....27
Anderson v. Creighton, 483 U.S. 635, 97 L.Ed. 2d 523, 107 S.Ct.3034, (1987) 15
Angelico v. Lehigh Valley Hospital et. al., 184 F. 3d 268 (3d Cir. 1999).....9
Angelico v. Lehigh Valley Hospital, et. al., 984 F. Supp. 308 (E.D. Pa. 1998).....9
Angelico v. LVH et. al., 2000 U.S. Dist. LEXIS 18415-18420, Dec. 7, 2000.....10
Angelico v. LVH, Court of Common Pleas of Lehigh County, Civil Action No. 97-C-1671 (Sept.19, 1997).....9
Angelico v. LVH, Court of Common Pleas of Pennsylvania, 1802 CD 1999 (May 25, 2000, slip op.).....9
Angelico v. St. Luke's Hospital, Lehigh County Court of Common Pleas, Civil Action No. 95-C-1108.....6
Austin v. McNamara, 979 F.2d 728 (9th Cir. 1992).....13
Blair v Delta Air Lines, Inc. (1972, SD Fla) 344 F Supp 367, 16 FR Serv 2d 1389.....28
Blissett v. Coughlin, 66 F.3d 531 (2d Cir. 1995).....25
Brader v. Allegheny General Hospital, 167 F. 3d 832 (3d. Cir. 1999).....11, 16
Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324, (10th Cir. 1996) cert. denied , 520 U.S. 1181; 117 S. Ct. 1461(1997) 13, 15
Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318 (11th Cir. 1994) cert. denied 514 U.S. 1019 (1995)..12, 14, 16, 22
Business Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 111 S. Ct. 922; 112 L. Ed. 2d 1140; (1991) 27
Decker v. IHC Hospitals, Inc., 982 F.2d 433 (10th Cir.1992) 26
Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863 (1994) 28

Edwards v. Velvac, Inc., 19 F.R.D. 504; 1956 U.S. Dist. LEXIS 4362 (E.D. Wis. October 30, 1956) 27, 28
Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 47 L. Ed. 194, 23 S. Ct. 120 (1902) 12
Gabaldoni v. Washington County Hospital Assoc., 250 F.3d 255 (4th Cir. 2001) 13
Gabaldoni v. Washington County Hospital Assoc., 250 F.3d 255, 263(4th Cir. 2001) 13
Geo. P. Reintjes Co. v Riley Stoker Corp. (1995, DC Mass) 161 FRD 2, affd (1995, CA1 Mass) 71 F3d 44, 33 FR Serv 3d 697 28
Graham v. Connor et. al., 490 U.S. 386; 109 S. Ct. 1865 (1989) 23
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238, 88 L. Ed. 1250, 64 S. Ct. 997 (1944) 28
Imperial v. Suburban Hosp. Ass'n, 37 F. 3d 1026 (4th Cir. 1994).....26
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847; 108 S. Ct. 2194 (1987) 29
Madsen v. Audrain Health Care, Inc., 297 F.3d 694 (8th Cir. 2002).....13
Manion v.Evans, 986 F.2d 1036 (6th Cir. 1993).....26
Mathews v. Lancaster General Hospital, 87 F. 3d 624 (3d Cir. 1996).....11, 12
Mayberry v. Maroney, 529 F.2d 332 (3d Cir. 1976).....28
Oliveira v. Mayer, 23 F.3d 642 (2d Cir. 1994), *cert. denied*, 130 L. Ed. 2d 627, 115 S. Ct. 721, 115 S. Ct. 722 (1995)25
Pavelic & LeFlore v. *Marvel Entertainment Group*, 493 U.S. 120, 107 L. Ed. 2d 438, 110 S. Ct. 456 (1989) 27
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) 23
Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441 (11th Cir.1991).....14
Shechter v. Comptroller of the City of N.Y., 79 F.3d 265 (2d Cir. 1996).....15
Singh v. Blue Cross/Blue Shield of MA, 308 F.3d 25 (1st Cir. 2002).....12, 14

Sugarbaker v. SSM Health Care, 190 F.3d 905, 912 (8th Cir. 1999) 13
Toonder v. Lehigh Valley Hospital, 26 Pa. D.& C. 4th 488; 1995 701 affm'd .A.2d 791 (Pa Super., 1997) 5, 6
Toonder v. Lehigh Valley Hospital, Inc., Lehigh County Court of Common Pleas, Civil Action No. 94-E-18 4
U.S. v. Beggerly, 524 U.S. 38; 118 S. Ct. 1862; 141 L. Ed. 2d 32, (1998) 28
Van Cauwenberghe v. Biard, 486 U.S. 517; 108 S. Ct. 1945 (1988) 28

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1655 2
42 U.S.C. § 11111(a) 11, 25
42 U.S.C. § 11111(a)(1) 25, 29
42 U.S.C. § 11112(a) 13, 15, 22
42 U.S.C. § 11112(b) 19, 21, 22
42 U.S.C. §§ 11101-11152 (1988 & Supp IV 1992,) ..... i, 1, 9, 10, 11, 12, 13, 15, 19, 24, 25, 26, 28, 30
42 U.S.C. §11101(3) 29
42 U.S.C. §11112(4) 22
42 U.S.C. §11112(a)(1) 17
42 U.S.C. §11112(a)(2) 17
42 U.S.C. §11112(a)(3) 14
42 U.S.C. §11112(a)(4) 22
42 U.S.C. §11112(b)(3) 21
42 U.S.C. §11112(b)(3)(c)(iii) 21
42 U.S.C. §11133 24
42 U.S.C. §11151(1) 24

Rules

Fed. R. Civ. Proc. 50(a) 15, 28
Fed. R. Civ. Proc. 59 10
Fed. R. Civ. Proc. 60(b) 1, 2, 10, 13, 27, 28
Fed.R.Civ.Proc. 30(b)(6) 24

Legislative Materials

H.R. 5110, 99th Cong., 2d Sess. (1986), reprinted in *The Health Care Quality Improvement Act of 1986: A Legislative History*, at 196 (Bernard D. Reams ed. 1990)25
H.R. Rep. No. 903, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 6384, 6391.....26
H.R.Rep. No. 903, at 10, reprinted in 1986 U.S.C.C.A.N. at 6392-93.....16

Miscelaneous

5A Moore's Federal Practice P 50.07[2] (1994).....14
PA Health Care Cost Containment Council, *Consumer Guide to Coronary Artery Bypass Graft Surgery,* 1993-1998.....3

Articles

Eleanor D. Kinney, *Tapping And Resolving Consumer Concerns About Health Care,* 26 Am. J. L. and Med. 335 (2000) 29
Mark A. Colantonio, *The Health Care Quality Improvement Act of 1986 and its Impact on Hospital Law*, , 91 W. Va. L. Rev. 91 (1988) 11
Yann H.H. van Geertruyden, *The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 and State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review in the Medical Community*, 18 J. Contemp. Health L. & Pol'y 239 (2001) 29

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Third Circuit in Nos. 01-2585 and 01-2930 (Pet.App.4-10) is unreported. The Court of Appeals affirmed the Order entered July 16, 2001 of the U.S. District Court for the Eastern District of Pennsylvania in No. 96-CV-2861, granting Respondent Lehigh Valley Hospital's motion under Federal Rule of Civil Procedure 60(b) for immunity under the Health Care Quality Improvement Act of 1986, "HCQIA," 42 U.S.C. §§ 11101-11152 (1988 & Supp IV 1992) for which Petitioner respectfully seeks certiorari for review by this Court. The Order of the District Court without opinion (Pet.App.2) is unreported.

JURISDICTION

The Court of Appeals entered its decision on January 12, 2004. A timely petition for rehearing or rehearing en banc on the immunity issue only was denied on February 27, 2004 (Pet.App.11-12). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court would have jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Provisions of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, are set forth in the Appendix to the petition, (Pet.App.87-120)

Federal Rule of Civil Procedure 60: Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655. or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.Fed.R.Civ.Proc.60(b).

STATEMENT

Petitioner, Richard J. Angelico, MD, was a Cardiothoracic Surgeon, board certified by the American Board of Surgery

and American Board of Thoracic Surgery, licensed to practice medicine in Pennsylvania and New York. From 1987 through March 1994 he maintained active privileges at St. Luke's Hospital in Bethlehem, PA (SLH), and from 1986 through October 1994, privileges at Lehigh Valley Hospital (LVH), which were active category through 1991 and courtesy category thereafter[1]. At no time during his 9 years on staff at LVH or 8 years on staff at SLH was he the subject of disciplinary review, hearing, or inquiry of any kind for professional or personal misconduct or the object of any "incident report" or any other formal complaints. (Tr.Ex. P-216; T.T. 2-14-01 p.19) From 1991 thereafter he was the highest volume cardiac surgeon in the Lehigh Valley with, in 1993 and 1994, the lowest risk-adjusted operative mortality of any surgeon in the region. (PA Health Care Cost Containment Council, *Consumer Guide to Coronary Artery Bypass Graft Surgery,* 1993-1998)

In the fall of 1993 Dr. Panebianco of Panebianco-Yip Heart Surgeons contacted petitioner to join in a "super-group" to manage cardiac surgery at LVH, SLH, and a new program scheduled to begin in the Spring of '94 at Easton Hospital with Panebianco as proposed director. Petitioner declined the offer. (T.T. 2-15-01 p. 145). Prior to initiation of the new program, however, Panebianco withdrew as Director and Petitioner was contacted by Easton cardiologists to participate in building the program. (T.T. 3-1-01, pp.32-33).

Petitioner had over a number of years raised concerns with the hospital regarding breaches in patient care standards complicating the management of a large practice and the hospital's failure to address these issues. Following one such incident in March 1994 Petitioner advised the hospital that he would be resigning his privileges and

---

[1] Courtesy category limits the number of procedures per year a physician may perform to 12, but is otherwise identical to active category other than not requiring certain meeting attendance requirements.

transferring his practice to Easton. As part of the application process the Chief of Surgery at SLH submitted a letter on behalf of Petitioner recommending his application "without hesitancy or reservation." (Tr.Ex. P-216) For several weeks following the resignation the hospital attempted to encourage him to reconsider and withheld submission of the resignation (T.T. 2-14-01, pp.10-11). Eventually conceding to these requests Petitioner sought to reapply but was then advised that the hospital had recruited new surgeons and that the staff was full. Easton Hospital held petitioner's application for 6 months and returned it to him unprocessed in October 1994, stating that they had decided to award an exclusive contract to an outside surgeon. (Tr.Ex. P-217, P-226)

Petitioner requested an upgrade of his privileges at LVH from Courtesy to Active. As his privileges at LVH had just been renewed for a two year period in July, he assumed the process would be a formality. On October 15, 1994 LVH terminated his privileges for late payment of $200 in medical staff dues.(Tr.Ex.P-51).

ANGELICO'S REAPPLICATION AT LEHIGH VALLEY HOSPITAL

LVH utilizes a medical staff development plan (Manpower Plan) which requires all applicants to the staff to acquire a "manpower slot" which is normally granted only to pre-existing groups. In March 1994 the Board instituted a "numerosity requirement" for cardiac surgery necessitating a minimum volume of "pump cases" each year to maintain privileges and rescinding all existing manpower slots. That month an independent cardiac surgeon, Dr. Geoffry Toonder, filed suit in equity in Lehigh Valley Common Pleas Court after LVH terminated the manpower slot he was utilizing to acquire an associate whose application was to go before the Credentials Committee the next day. *Toonder v. Lehigh Valley Hospital, Inc.*, Lehigh County Court of Common Pleas, Civil Action No. 94-E-18. Dr. Toonder determined he needed an associate to acquire enough cases to meet the hospital's numerosity requirement.

In November 1994 LVH returned the slot to Dr. Toonder by agreement of settlement whereby they agreed to fairly review an applicant of his choosing. Dr. Toonder contacted Angelico because of his large referral base and offered his "manpower slot" to permit Angelico to reapply to the staff of LVH.

Angelico submitted his reapplication for privileges at LVH on Nov. 6, 1994. As his privileges had just been renewed at the hospital for a 2 year period in July (Tr.Ex.P-35) and as the hospital bylaws required that review to be "all in the same manner as in the case of an initial appointment" (LVH Bylaws, VI § C, 2,(b)) he assumed the procedure would be uncomplicated. LVH did not submit the application to its Credential Committee for 5 months, claiming that St. Luke's Hospital was not being forthcoming regarding the circumstances of Angelico's resignation.

On March 18, 1995 Dr. Toonder sought injunctive relief from the Common Pleas Court to prevent the loss of his privileges which would occur April 1 and to enforce agreement of settlement. A temporary injunction was granted and a preliminary injunctive hearing held on April 18 and 19 where Angelico was called as a sequestered witness. He was not represented by counsel.(*Toonder* Hearing (LVH-17), 7-5-95, p.155, Tr.Ex. LVH-17) In the interim, Dr. Angelico's application was submitted to the hospital's Credential's Committee and unanimously approved on April 13. (Tr.Ex.P-63)

Following the hearing the Court affirmed the injunction, determining that LVH had improperly revoked Angelico's Courtesy privileges and delayed his application. *Toonder v. Lehigh Valley Hospital,* 26 Pa. D.& C. 4th 488; 1995, and scheduled a permanent injunction hearing for July 5, 1995, following which the Court reversed itself and denied the permanent injunction which was affirmed by the Superior Court, 701 A.2d 791 (Pa Super., 1997)

In January 1995 Angelico contracted with counsel following learning that misinformation had been circulated to both LVH and Easton, misrepresenting the circumstances of his resignation from St. Luke's. Complaint was filed on May 11, alleging constructive discharge and tortuous interference with contractual relations. *Angelico v. St. Luke's Hospital,* Lehigh County Court of Common Pleas, Civil Action No. 95-C-1108[2]. The complaint implicated the Chief of Surgery and two perfusionists at St. Luke's in several quality care issues.

TOONDER COURT DISCOVERY

On April 1, 1995 four independent cardiac surgeons lost privileges at LVH. All remaining surgeons were members of a single group, Panebianco-Yip Heart Surgeons.(Tr.Ex. P-164) Dr. Angelico's application, which had been approved by Credentials in April, was scheduled for review by the hospital's Medical Executive Committee (MEC) on May 2. On April 21, Dr. Michael Sinclair of Panebianco-Yip sent a letter to MEC asking "do we really need another heart surgeon at LVH?." (Tr.Ex. P-64). On May 2, 1995 the Medical Executive Committee tabled consideration of Angelico's application.

Following the preliminary injunction, LVH used the subpoena power of the *Toonder* litigation (to which Angelico was neither a party nor represented by counsel) and issued subpoenas to 5 individuals at SLH: the Chief of Surgery, Dr. Tachovsky; the two perfusionists, Messrs. Widmer and Klementovitch; the Vice President of Medical and Academic Affairs, Dr. Saunders; and the Director of Patient Care services and former Director of Nursing, Linda Young, RN. Depositions were held on May 19, 22, 24, 31, and June 1.

Both Dr. Saunders and Ms. Young confirmed that Angelico had never been considered for disciplinary review during his tenure at St. Luke's. The other three, however,

---

[2] This action has been stayed since 1996 pending resolution of this case.

gave disparaging testimony and Dr. Tachovsky produced several complaint letters about Angelico, allegedly maintained in his own "personal" file. A significant portion of these papers allegedly originated from Bethlehem Cardiothoracic Surgical Associates, Angelico's only competitor at St. Luke's.[3]

None of these papers, however, had ever been subject to review by St. Luke's, nor had Angelico ever been confronted with them by way of hearing or any other inquiry. None are mentioned in his official Credentials file at SLH (T.T. 2-14-01 pp.17-43).

The *Toonder* Court admitted the depositions and documents over a hearsay objection by Dr. Toonder's counsel "not for the truth of the matters therein." (*Toonder* Hearing (LVH-17), 7-05-95 pp. 22-23). No deponent nor author of any document was called by the Court (the deponents were not the authors of the documents).

MEDICAL EXECUTIVE COMMITTEE JUNE 6, 1995

On May 26, 1995 Dr. Angelico, who had attended the depositions without counsel was advised by LVH that the materials were going to be given to the MEC, was given copies of the depositions, and instructed to write a "brief response."(Tr.Ex. P-74). On June 6 the MEC, without hearing of any kind, voted to deny his application for privileges. Petitioner was advised of the decision by letter which explained:

> The Medical Executive Committee determined you failed to demonstrate an ability to work cooperatively with others and found your conduct to be unprofessional and disruptive. No further details were given. (Tr.Ex. P-85)

---

[3] None of these papers have ever been authenticated and are not part of the record of this case.

THE FAIR HEARING

Petitioner requested a hearing on the decision per the Bylaws of LVH. It was held on five nights between Sept.5 and Dec. 12, 1995. The hospital presented a single witness, Dr. John Costaldo, Chairman of the Medical Executive Committee, who presented the deposition materials reviewed by MEC. Petitioner presented 13 witnesses who refuted the material. As the hearing held no subpoena power he was unable to call any of the deponents or authors of any complaint allegation nor were they made available by the hospital for cross-examination by petitioner's counsel. (Tr.Ex. LVH-34 (Fair Hearing Transcript)).

The Hearing Panel upheld the decision of the MEC. Citing the due process violations, Petitioner appealed the decision to the Appellate Review Committee of the hospital and the Board of Trustees, both unsuccessfully.

On June 17, 1996 LVH placed an entry into the National Practitioners Data Bank (Tr.Ex.. P-106, see infra)

PROCEEDINGS IN THE COURT BELOW

On April 9, 1996, prior to the decision of the Appeals Committee and Board or Data Bank entry, complaint was filed asserting antitrust claims for illegal group boycott, concerted refusal to deal, and exclusive dealing under Section 1 of the Sherman Act as well as monopolization, attempted monopolization and/or conspiracy to monopolize under Section 2 of the Sherman Act against the hospital Defendants Lehigh Valley Hospital, Inc., St. Luke's Hospital of Bethlehem, PA, and Easton Hospital, and the surgical group practice defendants Panebianco-Yip Heart Surgeons and Bethlehem Cardiothoracic Surgical Associates (Complaint pp. 23-27). The Complaint also asserted § 1983 due process claims against Defendants Brian M. Peters, Esq., Post & Schell, P.C., and LVH (Id. 29-33). Additionally the complaint asserted state claims of breach of contract against Respondent LVH on the revocation of his

Courtesy privileges (Id. pp. 33-34) and tortuous interference against SLH. (Id. pp. 35-37)

On June 26, 1996 Counts I and III (antitrust claims) as against defendants Brian M. Peters, Esq. and Post and Schell, P.C were voluntarily dismissed (Dkt. 96-2861 # 21). On Sept 13, 1996 the District Court sanctioned Plaintiff's counsel for not timely dismissing said counts and further dismissed with prejudice Count IV (§ 1983) as against the counsel defendants, dismissing them from further proceedings in this matter (Id. #33). On May 23, 1997 Petitioner moved for dismissal of Count IV (§ 1983) as against LVH by joint motion with LVH, which was granted on Oct. 7, 1997 (Id. #83). Following discovery limited to antitrust standing and injury, summary judgment in favor of Defendants was granted by the District Court on Oct. 31, 1997. *Angelico v. Lehigh Valley Hospital, et. al.*, 984 F. Supp. 308 (E.D. Pa. 1998), reversed in relevant part by the Court below on July 16, 1999, affirming the dismissal of the §1983 claims but otherwise remanding for further proceedings. *Angelico v. Lehigh Valley Hospital et. al.*, 184 F. 3d 268 (3d Cir. 1999).

Following LVH's entry into the Data Bank, Petitioner filed a state court action for breach of contract on the due process contract violations of the Fair Hearing and tortuous interference on the Data Bank entry, *Angelico v. LVH*, Court of Common Pleas of Lehigh County, Civil Action No. 97-C-1671 (Sept.19, 1997) and sought to incorporate these into the Federal claim. The amended complaint was denied as moot when the District Court granted summary judgment. (Dkt. 96-2861 #82).[4]

In July, 2000 all remaining defendants both individually and jointly again filed summary judgment motions which

---

[4] LVH was granted summary judgment in the Common Pleas Court based on collateral estoppel and HCQIA Immunity which was reversed by the Commonwealth Court *Angelico v. LVH*, Court of Common Pleas of Pennsylvania, 1802 CD 1999 (May 25, 2000, slip op.)

were denied by the District Court. (*Angelico v. LVH et. al.*, 2000 U.S. Dist. LEXIS 18415-18420, Dec. 7, 2000)

Trial began Feb. 5, 2001. On Feb. 9, 2001 the issues between Plaintiff and Defendants Panebianco-Yip Heart Surgeons, P.C. and Bethlehem Cardiothoracic Surgeons, P.C. were settled (Dkt 96-2861 #187).

LVH argued to the Court that the question of whether the Data Bank entry was properly determined was not a legitimate trial issue as it had not been pled and litigated. The District Court agreed and excluded the Data Bank entry from submission to the jury. (T.T. 3-13-01, pp. 249-254, Pet.App. 91-95). Petitioner objected to the Charge on 2 occasions (Pet.App. 91-98), and reiterated the objection post-charge (T.T. 3-15-01, p.96, Pet.App. 84). On March 19, 2001 Judgment was entered on behalf of all Defendants. Petitioner's post-trial motions under Fed. R. Civ. Proc. 59 and 60 were denied by the District Court on May 17, 2001 and Notice of Appeal filed on June 18, 2001. On July 16, 2001 the District Court granted LVH's Praecipe to Docket its Fed. R. Civ. Proc 60(b) Motion for Immunity under the HCQIA as if filed on March 20, 2001 (Pet.Ap. p.1) as well as granting the motion (Pet.Ap. p.2). Amended Notice of Appeal was filed on July 19, 2001.

On Feb. 26, 2002 Appellee SLH advised the Court its insurance carrier, PHICO Ins. Co. was in liquidation and on April 18, 2002 the Court below stayed the Appeal. By motion of May 7, 2002 Petitioner advised the Court that on May 2, 2002 the stay of the Commonwealth Court in the PHICO matter had been lifted. On Oct. 1, 2002 the Court below lifted the stay. (See Dkt. U.S.C.A. for 3d. Cir. 01-2930)

On Oct. 28, 2003 the case was submitted and on Jan. 12, 2004 Judgment was affirmed. (Pet.Ap.pp.3-10) On February 27, 2004 Petitioner's timely request for rehearing/rehearing en banc on the immunity issue only was denied. (Pet.Ap. p.11)

REASONS FOR ISSUING THE WRIT

I. WHILE IMMUNITY IS A QUESTION OF LAW, WHETHER THE REQUIREMENTS FOR IMMUNITY UNDER HCQIA HAVE BEEN MET IS A QUESTION OF FACT WHICH SHOULD NOT BE WITHHELD FROM JURY CONSIDERATION

The Health Care Quality Improvement Act is comprised of three basic elements: first, it provides immunity from monetary damages for any peer review activity that has met due process standards; second, HCQIA mandates that hospitals and insurance carriers report to a national data bank information that relates to the professional competence of physicians, and thirdly, it requires hospitals to request information from the data bank for all physicians who apply for or have privileges at their institutions. Mark A. Colantonio, *The Health Care Quality Improvement Act of 1986 and its Impact on Hospital Law*, 91 W. Va. L. Rev. 91, 92 (1988). It provides a presumption of immunity to health care providers involved in peer-review, provided 4 criteria are met.:

> For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--(1) in the reasonable belief that the action was in the furtherance of quality health care,(2) after a reasonable effort to obtain the facts of the matter,(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). 42 U.S.C. §11112(a)

All 4 prongs must be established by a party seeking immunity. *Brader v. Allegheny General Hospital*, 167 F. 3d 832, 839 (3d. Cir. 1999); *Mathews v. Lancaster General*

Hospital, 87 F. 3d 624, 632 (3d Cir. 1996). In light of this presumption of immunity Courts of Appeal have adopted a standard of burden allocation where:

> The standard for reviewing summary judgment under the HCQIA is therefore unconventional: although the defendant is the moving party, we must examine the record to determine whether the plaintiff "satisfied his burden of producing evidence that would allow a reasonable jury to conclude that the Hospital's peer review disciplinary process failed to meet the standards of HCQIA." *Brader*, 167 F.3d 832, 839, quoting *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1334 (11th Cir. 1994)

"With the benefit of the statutory presumption, the [defendant] is relieved of the initial burden of providing evidentiary support for its contention at summary judgment that there is no genuine issue of material fact on its compliance with the HCQIA standards." *Singh v. Blue Cross/Blue Shield of MA*, 308 F.3d 25, 33 (1st Cir. 2002)

Once the plaintiff meets his initial burden the matter goes to trial.

> The statutory presumption at issue here simply adds another element to the plaintiff's case, and hence another issue to be "made as prescribed [before] the right of trial by jury accrues." *Singh*, 308 F.3d 25, n.6 (citing *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320, 47 L. Ed. 194, 23 S. Ct. 120 (1902)).
>
> "The issue made as prescribed, the right of trial by jury accrues." Id.

There is significant disagreement, however, among the Circuits on the ultimate determination of HCQIA immunity once trial has begun.

The 11th Circuit states that "HCQIA immunity is a question of law for the court to decide" and limits jury involvement to settling "disputed subsidiary issues of fact." *Bryan*, 33 F.3d at 1332-33. "Under no circumstances should the ultimate question of whether the defendant is immune

from monetary liability under HCQIA be submitted to the jury." Id., 1333.

This view is echoed by the 8th Circuit, *Madsen v. Audrain Health Care, Inc.*, 297 F.3d 694, n.3 (8th Cir. 2002) and the 4th Circuit, *Gabaldoni v. Washington County Hospital Assoc.*, 250 F.3d 255, 263(4th Cir. 2001), and is the argument Respondent made to the District Court in its Fed. R. Civ. Proc. 60(b) motion affirmed by the Court below.

Bryan's articulation of the summary judgment standard, however, follows the other circuits (*Sugarbaker v. SSM Health Care*, 190 F.3d 905, 912 (8th Cir. 1999); *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1334 n.9 (10th Cir. 1992) (determining whether the plaintiff "provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a)"); *Austin v. McNamara*, 979 F.2d 728 at 734 (9th Cir.1992) by clearly contemplating a role for the jury in the ultimate determination of HCQIA immunity:

> . . . the rebuttable presumption of HCQIA section 11112(a) creates an unusual summary judgment standard that can best be expressed as follows: "Might a reasonable jury, viewing the facts in the best light for [the plaintiff], conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?"*Bryan*, 33 F.3d 1318 at 1333 (quoting *Austin*, 979 F.2d 728 at 734 (9th Cir,1992).

As the 1st Circuit points out:

> [T]he only example Bryan gives of a "disputed subsidiary issue[] of fact" is a HCQIA immunity determination itself: "If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special

> interrogatories." *Bryan*, 33 F.3d 1318 (emphasis added) (citations omitted). This query is almost identical to the third HCQIA standard. See 42 U.S.C. §11112(a)(3) (denying immunity if peer review board fails to give physician "adequate notice and hearing procedures"). Given Bryan's internal inconsistency, and its contradiction of the other circuits' holding that a jury may in principle make a HCQIA immunity determination. we decline to adopt its designation of HCQIA immunity determinations as pure questions of law off limits to a jury. *Singh*, 308 F.3d 25, n7

Even Bryan, however, holds that nothing in the Act changes the standards a Court must follow for post-trial judgment.

> Like the district court in ruling on the motion for judgment, we view all of the evidence in the light most favorable to the non-moving party. It is well established that "judgment as a matter of law after the verdict may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice P 50.07[2] (1994). Accordingly, "we must independently determine whether the facts and inferences point so overwhelmingly in favor of the movant ... that reasonable people could not arrive at a contrary verdict." *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1448 (11th Cir.1991). *Bryan*, 33 F. 3d 1318,1333

It is noted that this Court denied certiorari in *Bryan*, 514 U.S. 1019, 131 L. Ed. 2d 220, 115 S.Ct 1363 (1995). However, this case is distinguishable from Bryan in several respects. In that case an extensive trial record of the hospital's peer-review process was before the Court including an official credentials file documenting more than 50 formal incident reports for "unprofessional or disruptive behavior" *Bryan*, 33 F.3d 1318 at 1326; documentation of

repeated "meetings and counseling by the executive committee"; a voluntary leave of absence to seek psychiatric counseling and medications "to control his temper" Id. at 1327; findings of an *ad hoc committee* formed "to investigate Dr. Bryan's long term pattern of behavior" Id.; two recommendations for suspension, Id at 1328; a formal hearing following four further incidents (including two for physical assault on nurses) where he was advised of the charges (the last two incident reports), confronted by and cross-examined the witnesses directly involved in the incidents, Id at 1329, and he admitted both at the hearing and at trial that his "behavior had, at times been 'disruptive' and 'unprofessional'" Id. at 1326. Based on this record developed at trial the hospital sought judgment as a matter of law on HCQIA immunity on a Fed. R. Civ. Proc. 50(a) motion which was renewed post verdict but denied by the District Court, reversed by the 11th Circuit Court of Appeals. There, as opposed to here, HCQIA immunity was pled and tried as an affirmative defense. Indeed, in its brief to the Court below Respondent admitted: "The only State Court action pled and tried in this case was the Dues Provision of the by-laws." (LVH Brief, p.33, FN5).

HCQIA immunity is not blanket immunity but qualified immunity. *Brown*, 101 F.3d 1324, n.9. Further, this Court has held that entitlement to such immunity requires more than a defendant's good faith belief that the conduct met the required standard which itself is "irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed. 2d 523, 107 S.Ct.3034, (1987). "Qualified immunity is an affirmative defense that must be pled and proved by the defendant." *Shechter v. Comptroller of the City of N.Y.*, 79 F.3d 265, 270 (2d Cir. 1996)

The legislative history of §11112(a) indicates that the statute's reasonableness requirements create an objective standard of performance, rather than a subjective good faith

standard. As the House Committee on Energy and Commerce explained:

> Initially, the Committee considered a "good faith" standard for professional review actions. In response to concerns that "good faith" might be misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action, the Committee changed to a more objective "reasonable belief" standard. The Committee intends that this test will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded thattheir action would restrict incompetent behavior or would protect patients. H.R.Rep. No. 903, at10, reprinted in 1986 U.S.C.C.A.N. at 6392-93

"[T]he good or bad faith of the reviewers is irrelevant. 'The real issue is the sufficiency of the basis for the [Hospital's] action'" *Brader*, 167 F. 3d 832, 840 quoting *Bryan*, 33 F.3d 1318, 1335. There must be an "objective" showing that the hospital's action "would restrict incompetent behavior or protect patients." *Matthews*, 87 F. 3d 624, 635.

As neither the District Court nor the Court below pointed to the factual basis for its determination, with this clearly delineated objective standard in mind, we must turn to the applicable record, all of which is undisputed, and quite literally, inapposite to the requirements of §11112(a).

Dr. John Costaldo, Chairman of LVH's Medical Executive Committee, and sole witness for the hospital at Angelico's hearing, on review of the entire record given to Med Exec on June 6, 1995 confirmed:

> There was never any concern in the records we reviewed of quality of care issues requiring corrective action of any kind. (Fair Hearing 9-27-95, p. 30, LVH-34)

Q. And is the medical executive committee–did the medical executive committee find that Doctor Angelico ever in his tenure at St. Luke's hospital committed any act or engaged in any conduct that fractionated or compromised the care of a patient of his during those six or so years?

A. No, I never did. Never came up as a question. (Fair Hearing 9-27-95 p.29(emphasis added);See also Id., p.12, p.26)

The Fair Hearing Panel concluded:

> ... it must be emphasized that during the course of these proceedings, there has been no question as to the technical competency of Richard J. Angelico, M.D. All of the evidence clearly and undeniably establishes that Dr. Angelico is a medically competent and technically skillful cardiothoracic surgeon. (Tr. Ex. P-101, p.11)

And the uncontested evidence before it:

> Q. I want to ask you, isn't it a fact that you confirmed under oath that you cannot find one instance during Dr. Angelico's entire tenure at St. Luke's where he did not provide the highest degree of care to his patients?
>
> A. That's my recollection. (T.T. 2-22-01, p.126 (Dr. Tachovsky, Chief of Surgery, SLH))

Applying the language of the threshold objective reasonableness standard Congress has laid out to these admissions of the hospital, it cannot be said that no reasonable jury, if presented this evidence, could find for a plaintiff challenging the hospital's compliance with §11112(a)(1) in light of uncontroverted witness admission that it "never came up as a question."

The second prong of the immunity provisions requires the action be taken "after a reasonable effort to obtain the facts of the matter" §11112(a)(2).

It is undisputed that neither the Medical Executive Committee of LVH nor any other person or committee of that hospital conducted any investigation whatsoever of any allegation raised against Angelico at any time. The allegations of misconduct consisted of discovery depositions of 5 individuals, obtained by LVH in a litigation to which Angelico was not a party nor represented by counsel, which were admitted in that non-party litigation "not for the truth of the matters asserted," (*Toonder* Heari g (LVH-17), 7-05-95 pp. 22-23).) and subsequently presented to the MEC of LVH on June 6, 1995.

Regarding that material the Chairman of the Medical Executive Committee admitted:

> And the sense was that there was a serious problem here. The specifics, how much were true and how much were not, I think we felt would be very difficult to get, weren't about to begin an interview process and try to weigh the mathematics as to who said what.(Fair Hearing 10-17-95, p.45, LVH-34, p.45)

That same material was presented at Angelico's hearing over a hearsay objection, and comprised the substantive basis for its determination, again with no attempt at authentication or verification:

> Ms. Olexa: You are simply offering those depositions for purposes of what med exec had before it in order to make its determination. You're not offering those depositions' testimony for the truth of the matter asserted in those depositions, is that what you are telling me?
>
> Mr. Bubba: That's correct. What I am indicating is that information is the information that was given to med exec. And that information says Doctor Angelico is a Communist, I would not put him on staff. I'm not trying to prove that he's a communist because of the chief perfusionist said it. What I'm saying is med exec reviewed that, that's the material that they had in front of them. It's up to other people to determine whether or not that was credible testimony, which was given under

oath. (Fair Hearing 9-5-95, pp.103-104) (Olexa-Hearing Officer; Bubba-LVH counsel)

At trial, Hearing Panel member, Dr. Marcus, confirmed that the hospital made no attempt to investigate a single allegation:

Q. Not a single witness testified with personal knowledge that any of those incidents actually occurred as alleged; isn't that true?

A. Yes. (T.T. 2-20-01, pp.187-188)

The Court is reminded that the alleged misconduct did not occur at LVH, but at another facility, St. Luke's Hospital. It is undisputed that Angelico was never subject to disciplinary review or inquiry for any clinical or behavioral misconduct during his nine years on staff at LVH or 7 years at SLH. (Tr.Ex. P-216; T.T. 2-14-01 p.19)

Q. Doctor Giamber, if someone has a significant behavioral problem at St.Luke's, could that person be brought up for corrective action?

A. Absolutely, been done many times.

Q. Never happened with Doctor Angelico?

A. Never. (Fair Hearing 10-17-95, p.153)

The "reasonable effort" standard required under 42 U.S.C. §11112(a)(2) cannot be said to be met by this level of inquiry.

A reasonable jury could conclude that the hospital's admission that the truth of the allegations was immaterial, and did not warrant even "an interview process" does not represent a "reasonable effort to obtain the facts" §11112(a)(2).

The third requirement for immunity requires the action be taken "after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances" §11112(a)(3).

Section 11112(b) of HCQIA enumerates the minimum, or "safe harbor" procedures that will satisfy the adequate notice and hearing requirement of section 11112(a)(3). "Organized

in the form of a detailed checklist, the provision defines what hospitals conducting peer review disciplinary procedures must do to obtain the Act's protections for itself and the members of its peer review bodies."*Bryan*, 33F.3d 1318, 1323

It is axiomatic that, at a minimum, "adequate notice" requires the physician be advised of what he has been charged with. Yet here, when asked about the notice sent to Angelico, the following exchange occurred with Mr. Hart, Vice President of LVH:

> Q. ...What conduct were you giving notice of to Dr. Angelico that was considered unprofessional and disruptive?
>
> A. Sir, it would be the sum total of what appeared in the depositions.
>
> Q. Is there any specific act that Dr. Angelico was being told, that you did X, and X is unprofessional and disruptive?
>
> A. It does not appear in that letter, no,sir.
>
> Q. If it doesn't appear in that letter, did the Medical Executive -- well, let me phrase it this way. The Medical Executive Committee never gave you a list and said, these are the acts that we consider unprofessional and disruptive, did they?
>
> A. They did not. (T.T. 2-20-01, pp.16-17)

Section 11112(b) requires the hearing "shall not be less than 30 days after the date of the notice" §11112(b)(2)(A). Yet here:

> As you know, the original hearing in the above captioned matter was scheduled for August 31, 1995. I recently learned that one of the members of the hearing committee was unavailable on that date....I might need to seek a continuance on behalf of the hospital.(Tr.Ex. P-92 (Aug. 14, 1994 letter of LVH counsel, Bubba, to Hearing Officer, Olexa))

> We must oppose any such request ...we have already secured witnesses for August 31, 1995. (Tr.Ex. P-93 (Aug. 15, 1995 response from Petitioner's Counsel, Lisa Miller to Mr. Bubba))

Ms. Miller's letter of August 17, 1995 to hearing officer Olexa[5]:

> Mr. Bubba also acknowledges that Dr. Angelico does not waive any objections to the re-scheduling, as previously raised by us. Since you have already granted the requested continuance, we will proceed on Sept 5, 1995.(Tr.Ex. P-94, p.2)

Ms. Miller's letter of August 29, 1995:

> ...we are severely handicapped in our preparation for the hearing (including identifying witnesses) because we have not yet been told when Dr. Angelico will be afforded a meaningful opportunity to present his case...we cannot secure witnesses for a hearing when we do not know when that hearing will be scheduled. ...we are in receipt of John Hart's shocking letter to Dr. Angelico (dated August 21, 1995), in which he purports to confirm the rescheduling of the hearing to September 5, 1995 "by mutual agreement." This self-serving characterization of the continuance could not be further from the truth. (Tr.Ex. P-99)

Crucially, Courts of Appeal have acknowledged that the basic due process right of confrontation is inherent in the "adequate hearing procedures" requirement of §11112(b)(3), "in the hearing the physician has the right--to call, examine, and cross-examine witnesses" §11112(b)(3)(c)(iii) *Brader*,

---

[5] Hearing Officer Olexa, who was entirely responsible for what was admissable at the hearing, had an undivulged conflict of having been an attorney who had represented the hospital on 49 previous malpractice litigations (Tr. Ex. P-365; T.T. 2-20-01 pp. 146-148)

167 F.3d 832, 842;"Bryan was afforded full rights of representation, cross-examination, and confrontation." *Bryan*, 33 F.3d 1318, 1336. Indeed, Respondent LVH even acknowledged, on questioning regarding the depositions reviewed by MEC:

> Q. They weren't subject to cross-examination by Dr. Angelico, were they?
>
> A. No, that's the **purpose** of the hearing, sir.
>
> (T.T. 2- 20-01, p.18 (Hart, V.P. of LVH)) (emphasis added)

A reasonable jury could then conclude that, in light of the fact that no deponent, nor author of any unsupported allegation document from Dr. Tachovsky's "personal" file (the deposition exhibits) were ever called for cross-examination at the hearing (Tr.Ex.LVH-34), the "safe-harbor" requirement of §11112(b)(3) (c)(iii) has not been met.

Respondent's admissions that the truth of the allegations against Petitioner could not be determined (Fair Hearing 10-17-95, p.45) and the failure to comply with the requirements of §§ 11112(1-3) would preclude a finding of compliance with §11112(a)(4).

Having met his burden of overcoming the initial presumption in favor of the hospital and the matter submitted to trial, any factual question related to whether or not any of the four requirements for immunity have been met must be submitted to and determined by the jury:

> The plaintiff "provided sufficient evidence to permit a jury to find she has overcome, by a preponderance of the evidence, any of the four statutory elements required for immunity under 42 U.S.C. § 11112(a)" *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1333, (10th Cir. 1996)cert. denied , 520 U.S. 1181; 117 S. Ct. 1461(affirming denial JMOL and immunity when jury found hospital reviewed too few patient charts to demonstrate "reasonable efforts to obtain facts," despite expert testimony to the contrary.)

Similarly, this Court has stated:

> [i]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) (citationsand quotation omitted).

II. HAVING WITHHELD FROM JURY CONSIDERATION WHETHER THE DATA BANK ENTRY WAS PROPERLY DETERMINED, AND HAVING FAILED TO PROPERLY CHARGE THE JURY ON ANY OF THE FACTUAL QUESTIONS NEEDED FOR AN IMMUNITY DETERMINATION, THE DISTRICT COURT'S GRANT OF IMMUNITY ON A POST-TRIAL MOTION WAS AN ABUSE OF DISCRESSION

On June 17, 1996 LVH placed the following entry into the National Practitioners Data Bank:

> **During the application process, Lehigh Valley Hospital learned of several incidents involving the physician at another hospital at which he had privileges. The physician was given a hearing and Lehigh Valley Hospital determined that the physician engaged in unprofessional and disruptive conduct, and had failed to demonstrate an ability to work cooperatively with others (517).**

No trial witness shown that paragraph deemed it accurate. Indeed, on questioning regarding the entry, the Vice President, Director of Quality Assurance, and

Fed.R.Civ.Proc. 30(b)(6) corporate representative of that "other hospital" stated:

> Q. Now, we just went through all the by-laws that talked about the ability to work harmoniously with others, and we went through at least six years of scrutiny for [r]eapplications that talked about whether this applicant satisfactorily demonstrated the ability to be an efficient, functioning member of a healthcare team. All that stuff on Dr. Angelico is clean, correct?
> A. Correct.
> Q. So as you read this Data Bank entry, that is not a valid representation of Dr. Angelico's tenure at your hospital, is it?...
> A. No, it's not of our hospital, by my evaluation.
> Q. Well, is your evaluation any different from the official St. Luke's evaluation?
> A. No, my evaluation is the official St. Luke's evaluation. (T.T. 2-14-01, pp.86-87)

The HCQIA requires reporting to the data bank actions of a health care entity which adversely affect a physician's privileges, 42 U.S.C. §11133, which includes denial of hospital privileges, 42 U.S.C. §11151(1). Immunity from liability for such a report requires compliance with §11112(a).

A review of the jury charge in this case reveals <u>not one word</u> relating to the peer-review process conducted by Respondent LVH. (Pet.App. pp.13-86). Nor is there any inquiry on the adequacy of the required procedures leading up to its ultimate determination, the Data Bank Entry.(Id.)

The jury found no Sherman Act violation. It is unclear if the case failed on product market, geographic market, conspiracy, or injury. They also found no breach of contract against SLH or LVH. What they did not find, however, nor were they asked, was whether the peer-review process

conducted by Respondent resulting in that Data Bank entry complied with the requirements of 42 U.S.C. §11112(a).

It is submitted that these are questions of fact; and permitting the Respondent the end-around-run of withholding them from the jury only to request immunity on the issues on a post-trial motion is manifestly unjust. The "facts material to the qualified immunity defense must be presented to the jury to determine its applicability once the case has gone to trial." *Blissett v. Coughlin*, 66 F.3d 531, 538 (2d Cir. 1995). See also *Oliveira v. Mayer*, 23 F.3d 642, 649-50 (2d Cir. 1994), *cert. denied*, 130 L. Ed. 2d 627, 115 S. Ct. 721, 115 S. Ct. 722 (1995) (vacating judgment and remanding for a new jury trial on the issue of qualified immunity).

III. AS IMMUNITY UNDER HCQIA IS LIMITED TO LIABILITY DAMAGES, THE COURT BELOW HAS ERRED IN AFFIRMING THE DISTRICT COURT'S ORDER DECLARING LVH "IMMUNE FROM SUIT"

The language of HCQIA does not provide for immunity from suit. Section 11111(a)(1) provides that if a professional review action meets the required reasonableness and due process standards, the peer review participants "shall not be liable in damages." 42 U.S.C. § 11111(a)(1). In reviewing the legislative history of the Act, an earlier version of this section provides that the professional review body "*shall not be subject to an action* or [be] liable under any . . . law." H.R. 5110, 99th Cong., 2d Sess. (1986), reprinted in *The Health Care Quality Improvement Act of 1986: A Legislative History*, at 196 (Bernard D. Reams ed. 1990) (emphasis added). The above-quoted italicized portion was deleted

during committee consideration . Id.

The House Committee on Energy and Commerce includes an explanation for the revision in its report of September 26, 1986:

> Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection. As redrafted, the bill now provides protection only from damages in private actions, and only for proper peer review, as defined in the bill...In addition, the bill does not restrict the rights of physicians who are disciplined to bring private causes of action for injunctive or declaratory relief. H.R. Rep. No. 903, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 6384, 6391

Other Courts of Appeals have viewed this legislative history as persuasive evidence that HCQIA's protection is immunity from monetary liability only and not from suit: "We hold that neither the HCQIA nor the Utah MPA establishes immunity from suit" *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433, 435 (10th Cir.1992); "we conclude that the Act does not confer a right not to stand trial," *Manion v.Evans*, 986 F.2d 1036, 1042 (6th Cir. 1993); "HCQIA immunity only covers liability for damages. It does not shield covered defendants from suit" *Singh*, 308 F. 3d 25, 44; "we use the term 'immunity' here in a limited sense" *Bryan*, 33 F. 3d 1318, 1322; "Our interpretation that the immunity granted by 42 U.S.C. § 11111(a) applies only to liability for damages is consistent with the conclusions reached by the other circuits that have considered the question" *Imperial v. Suburban Hosp. Ass'n*, 37 F. 3d 1026,1031 (4th Cir. 1994);

The distinction is not trivial. Respondent has placed a devastating and career ending entry in the National

Practitioners Data Bank alleging "unprofessional conduct" at "another hospital." The other hospital in question denies the validity of that characterization. (T.T. 2-14-01, pp.86-87). Petetioner reserves the right to challenge and seek modification of that entry, whether or not Respondent is liable for damages for its placement.

A trial court's exercise of discretion cannot be permitted to stand if this Court finds, on review, that such exercise rests upon a legal principle that can no longer be sustained. *Agostini v.Felton*, 521 U.S. 203; 117 S. Ct. (1997).

IV. THE GRANT OF IMMUNITY ON A POST-TRIAL MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b) IS IN CONFLICT WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE RULE

This Court has stated: "'We give the Federal Rules of Civil Procedure their plain meaning.' *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123, 107 L. Ed. 2d 438, 110 S. Ct. 456 (1989). As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous." *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533 at 540-541, 111 S. Ct. 922; 112 L. Ed. 2d 1140; (1991).

Before disposing of a motion under Fed R. Civ. Proc. 60(b) a district court must first determine that the motion on its face alleges grounds for relief available under Rule 60. *Wilson v Runyon* (1992, CA8 SD) 981 F2d 987, 60 CCH EPD P 41907, 24 FR Serv 3d 1043, reh, en banc, den (1993, CA8) 1993 US App LEXIS 655 and cert den (1993) 508 US 975, 125 L Ed 2d 668, 113 S Ct 2968. Unless the purpose for which the rule was enacted can be achieved, it should not be employed.)*Edwards v Velvac, Inc.* (1956, DC Wis) 19 FRD 504. The Rule asserts the Court's equitable power "to set aside a judgment whose enforcement would work

inequity." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244, 88 L. Ed. 1250, 64 S. Ct. 997 (1944).

The Rule was amended in 1946 to clarify that nearly all of the old forms of obtaining relief from a judgment were abolished but that the "independent action" survived. *U.S. v. Beggerly*, 524 U.S. 38, 45; 118 S. Ct. 1862; 141 L. Ed. 2d 32, (1998). However, "Such actions should be available only to prevent a grave miscarriage of justice." Id. at 47. The Court below itself has held that Rule 60(b) "provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances." *Mayberry v. Maroney*, 529 F.2d 332, 335 (3d Cir. 1976).

"Since the language of FRCP 60 is unambiguous, judicial inquiry should be complete." *Geo. P. Reintjes Co. v Riley Stoker Corp.* (1995, DC Mass) 161 FRD 2, affd (1995, CA1 Mass) 71 F3d 44, 33 FR Serv 3d 697. "This rule is applicable to clerical mistakes, mistakes in general, inadvertence, fraud and other reasons justifying relief; it does not provide for general reconsideration of order or judgment, notwithstanding inherent power of court over its judgments." *Blair v Delta Air Lines, Inc.* (1972, SD Fla) 344 F Supp 367, 16 FR Serv 2d 1389

"To use Rule 60(b) for the purpose of circumventing another rule... would be a perversion of the rule and its purpose." *Edwards v. Velvac, Inc.*, 19 F.R.D. 504, 507 ; 1956 U.S. Dist. LEXIS 4362 (E.D. Wis. October 30, 1956)

Should this Court hold that HCQIA does not afford "immunity from suit," the denial of qualified immunity which is not immunity "not to stand trial" but rather from monetary liability is not a final order for the sake of appealability, *Van Cauwenberghe v. Biard*, 486 U.S. 517, 523; 108 S. Ct. 1945 (1988), which renders rights "irretrievably lost. " *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 872 (1994). Denial of a Rule 50(a) motion[6]

---

[6] While passing reference is made to this motion in the trial transcript, it does not appear in the docket of the case. (See Dkt. 96-CV-2861)

for directed verdict on that basis would not be a final order for consideration under Fed. R. Civ. Proc. 60.

Respondent's motion for immunity notes the request is to preclude Petitioner from litigating in State Court what would be the same claims which it specifically had the District Court withhold from jury consideration here, as having been not pled and litigated. Not only is this not relief from an oppressive improper final judgment showing "extraordinary circumstances" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863; 108 S. Ct. 2194 (1987), it is a relief not provided for in the language of 42 U.S.C. § 11111(a)(1).

V. THIS COURT SHOULD USE ITS SUPERVISORY AUTHORITY TO CLARIFY THE PROPER IMPLEMENTATION OF 42 U.S.C. §§ 11101-11152

Congress, in enacting the Health Care Quality Improvement Act expressly found that effective professional peer review would improve the quality of medical care by discouraging medical malpractice and exposing incompetent physicians. 42 U.S.C. §11101(3). As admirable and essential this may be, with the increasing pressures of managed care and rise in economic credentialing, critics maintain that the current peer review process is highly political and can be easily manipulated to achieve economic or power-driven gains. Yann H.H. van Geertruyden, *The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 and State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review in the Medical Community*, 18 J. Contemp. Health L. & Pol'y 239, 252 (2001); Eleanor D. Kinney, *Tapping And Resolving Consumer Concerns About Health Care*, 26 Am. J. L. and Med. 335 (2000). The end result is that qualified physicians are removed from the marketplace and quality health care is not served.

The broad protections afforded a health care entity and the potential devastating consequences to a physician require, at

a minimum, that there be clarity in the proper application of the requirements of HCQIA.

The Court below has misapprehended the "rebuttable presumption" contained in the act to equate with absolving respondent of any responsibility whatsoever in a jury trial to demonstrate compliance with each of the four requirements for immunity to obtain. As the First, Second, Tenth, and even Eleventh Circuits have clearly articulated, once a plaintif has overcome his initial burden and the case goes to trial, the issues necessary for an immunity determination must be put to the jury. (T.T. 2-9-01, pp.15-16, Pet.Ap.91)

The jury in this case found no Sherman Act violation, which the trial defendants attacked on product market, geographic market, conspiracy, and injury; and while Petitioner clearly believes that was an erroneous determination, the jury was not asked to decide the issues before this Court. Further, the Court below has affirmed a result which, on its face, is not even available under HCQIA.

The "reasonable belief" requirement Congress articulated is not a "good faith" belief. A physician with an unblemished official record has had his livelihood taken away by a Committee that read five depositions over a weekend, which were admitted at a hearing "not for the truth of the matters asserted," and whose veracity was deemed "irrelevant."

This is not a result Congress had intended when it enacted HCQIA.

CONCLUSION

For all of the above reasons this Honorable Court should grant the petition for writ of certiorari.

Respectfully Submitted,
Richard J. Angelico, MD
Petitioner, Pro Se
2021 Weyhill Drive
Center Valley, PA 18034
(610) 838-2287

PETITION APPENDIX

Pages

District Court Order of 7-16-01 granting *Praecipe* of Respondent to docket Rule 60(b) Motion *nunc pro tunc*.....1

APPENDIX B

District Court Order of 7-16-01 granting Immunity under Fed.R.Civ.Proc. 60(b).....2

Judgment, U.S.C.A. for 3d. Cir. In 01-2585, 01-2930 3

APPENDIX A

Opinion, U.S.C.A. for 3d. Cir. In 01-2585, 01-2930 4-10

APPENDIX C

Order of 2-27-04 denying Rehearing/Reh. *En Banc* 11-12

Jury Charge in 96-cv-2861, 3-15-01 13-86

Verdict Slip in 96-cv-2861 87-89

Civil Judgment in 96-cv-2861, entered 3-19-01 90

Excerpt from Trial Transcript 2-9-01.....91

Excerpt from Trial Transcript 3-13-01.....91-95

Excerpt from Trial Transcript 3-14-01 95-98

Text of 42 U.S.C. 11101-11152 99-130

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
RICHARD J. ANGELICO, M.D.
vs.
LEHIGH VALLEY HOSPITAL, INC.,
ST. LUKE1S HOSPITAL OF BETHLEHEM
EASTON HOSPITAL, PANEBIANCO-YIP
HEART SURGEONS, BETHLEHEM
CARDIOTHORACIC SURGICAL ASSOC.,
P.C., BRIAN M. PETERS, ESQUIRE and :
POST & SCHELL, P.C.
CIVIL ACTION
NO. 96—CV-2861

Filed Jul 13 2001
ORDER

AND NOW, this 12th day of July, 2001, upon consideration of the Praecipe of Defendant Lehigh Valley Hospital to Docket the Motion for Immunity Under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §l1101-1152, which it filed in the form of a letter brief on March 20, 2001, and it appearing to the Court that the Motion was served upon all parties on or about March 20, 2001 and that the Plaintiff filed a response thereto, it is hereby ORDERED that the Clerk of Court is hereby DIRECTED to docket the said Motion for Immunity as having been filed on March 20, 2001.

BY THE COURT:

"/s/ J. Curtis Joyner"
J. CURTIS JOYNER, J.

ENTERED
JUL 1 6 2001
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD J. ANGELICO, M.D.
vs.
LEHIGH VALLEY HOSPITAL, INC.,
ST. LUKE1S HOSPITAL OF BETHLEHEM
EASTON HOSPITAL, PANEBIANCO-YIP
HEART SURGEONS, BETHLEHEM
CARDIOTHORACIC SURGICAL ASSOC.,
P.C., BRIAN M. PETERS, ESQUIRE and :
POST & SCHELL, P.C.
CIVIL ACTION
NO. 96—CV-2861

Filed Jul 13 2001
ORDER

AND NOW, this 12th day of Jul, 2001, upon consideration of the Motion Under Fed.R.Civ.P. 60(b) of Defendant Lehigh Valley Hospital for a Grant of Immunity Under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101, et. seg. and Plaintiff's response thereto, it is hereby ORDERED that the Motion is GRANTED and Defendant Lehigh Valley Hospital is declared immune from suit for the professional review proceedings which it conducted with respect to the plaintiff.(FN 1)

BY THE COURT:

FN 1 In so holding, we find that the professional peer review proceedings and fair hearings which Moving Defendant conducted in conjunction with reviewing Dr. Angelico's application for readmission to the Lehigh Valley Hospital staff and for full privileges thereby satisfied the requirements for immunity pursuant to 42 U.S.C. §11111 and §11112(a). See, Brader v. Allegheny General Hospital, 167 F.3d 832, 841 (3rd 1999) ; Mathews v. Lancaster General Hospital, 87 F.3d 624, 634 (3 Cir. 1996).

BY THE COURT:

ENTERED JUL 16 2001 "/s/ J. Curtis Joyner"
CLERK OF COURT J. CURTIS JOYNER, J.

APPENDIX B

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on October 28, 2003.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the orders of the said District Court entered on March 19, 2001, May 17, 2001, June 1, 2001, June 27, 2001, and July 16, 2001, be, and the same are hereby, AFFIRMED. Costs taxed against Appellant.

All of the above in accordance with the opinion of this Court.

ASSEST:(Sic)

"/s/ Marcia M. Waldron"

Clerk

Date: January 12, 2004
(U.S.C.A. for 3d. Cir. 01-2585, 01-2930)

NOT PRECEDENTIAL
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 01-2585, 01-2930
RICHARD J. ANGELICO, M.D.,
Appellant
V.
LEHIGH VALLEY HOSPITAL, INC.: SAINT LUKE'S HOSPITAL OF BETHLEHEM PENNSYLVANIA; EASTON
HOSPITAL; PANEBIANCO-YIP HEART SURGEONS; BETHLEHEM CARDIOTHORACIC SURGICAL ASSOCIATES, P.C.;
BRIAN M. PETERS, ESQ.; POST & SCHELL. P.C.; DECHERT, PRICE & RHOADS; JEFFREY G. WEIL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 96-cv-02861)
District Judge: The Honorable J. Curtis Joyner

Submitted Under Third Circuit LAR 34.1(a)
October 28, 2003

BEFORE: SCIRICA. Chief Judge, NYGAARD, and AMBRO, Circuit Judges.
(Filed: January 12, 2004)

OPINION OF THE COURT

NYGAARD. Circuit Judge.

Dr. Richard Angelico, a cardiothoracic surgeon who was denied access to surgical facilities in his area sued several hospitals, surgical groups, and various others for antitrust and § 1983 violations, inter alta. A jury found for the Defendants on all counts, and the District Court rejected Angelico's motion to alter the judgment or grant a new trial. The District Court also quashed a post-verdict subpoena and ruled that Defendant Lehigh Valley Hospital was entitled to immunity. On this appeal, we will refuse to disturb the judgment entered upon the jury's verdict. We also will affirm the District Court's exercises of discretion on the admissibility of evidence, mode of trial, scope of discovery, and availability of immunity.

1. FACTS AND PROCEDURAL HISTORY

Because the facts are known to the parties, we review them only briefly and only as they relate to the remaining Defendants, the Appellees before this Court, Lehigh

Valley Hospital, Inc., St. Luke's Hospital of Bethlehem, Pennsylvania, and Easton Hospital (collectively, "the Hospitals") FN1

Dr. Angelico is a cardiothoracic surgeon practicing in the Lehigh Valley area of Pennsylvania. Over the years, Angelico enjoyed privileges in the operating rooms of several of the Hospitals. Angelico alleges that in 1994 he was denied privileges at each of the Hospitals despite being a well-renowned surgeon.

The District Court granted summary judgment for the Defendants on Angelico's antitrust claims, stating that he lacked standing. This court reversed. *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 275 (3d Cir. 1999). The case proceeded to trial in February and March 2001, at the conclusion of which the jury found for the Defendants on all counts. The District Court rejected Angelico's request for amendment of the judgment or, alternatively, for a new trial.

Two issues lingered after the trial was complete and the District Court had entered judgment for the Defendants. The District Court found that Lehigh Valley Hospital was immune from liability for proceedings it conducted regarding Angelico. The Court also quashed a post-verdict subpoena that sought documents previously withheld from Angelico.

FN1. Defendants Panebianco-Yip Heart Surgeons, Bethlehem
Cardiothoracic Surgical Associates, PC, Brian M. Peters, and Post & Schell, PC are no longer in this suit.

At trial. Angelico was represented by counsel, but in this appeal he proceeds pro se. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

A. Jury Verdict

Angelico alleges that the jury's verdict as to (1) breach of contract by Lehigh Valley Hospital and St. Luke's Hospital, and (2) exclusive dealing by Lehigh Valley Hospital was against the weight of the evidence. It is axiomatic that this Court should afford great deference to jury decisions. Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 771 (3d Cir. 1975) ("Given our standard of review of jury verdicts and the right of a defendant to a jury trial, we should not lightly reverse a jury verdict which has absolved a defendant of liability."). Unless the record shows a miscarriage of justice or the verdict cries out to be overturned or shocks our conscience, the District Court should sustain a jury verdict. Greenleaf v. Garlock, Inc., 174 F.3d 352, 366 (3d Cir. 1999) (internal citations omitted). This Court reviews the District Court's decision on a motion to overturn a jury verdict for abuse of discretion. Id. at 365, Under this very strict standard, as there was ample evidence in favor of the Hospitals, we do not have occasion to overturn the jury's verdict or the District Court's order pursuant to it.

B. Admissibility of Evidence

Angelico argues the District Court acted improperly during trial by preventing him from introducing certain statements as evidence. Our standard of review

over the District Court's determinations on admissibility of evidence is abuse of discretion. Honeywell, Inc. v. Am. Standards Testing Bureau, Inc., 851 F.2d 652, 656 (3d Cir. 1988). Angelico asserts that the statements he sought to introduce satisfy an exception to the hearsay rule of the Federal Rules of Evidence. We are not persuaded, however, that the District Court abused its discretion in precluding Angelico from introducing the statements.

C. Mode of Trial

Angelico alleges the District Court held him to an "improper, disparate, and prejudicial standard" by making a statement to the jury that indicated he was not paying attention at trial and by cautioning Angelico and some of Angelico's witnesses that they should be responsive to questions asked. On a search of the record, we find nothing that compels us to believe the District Court committed error by making comments to the jury or to Angelico and his witnesses. "The trial judge's role is to preside over the trial; passively if possible but aggressively when indicated." *Holbrook v. Lykes Bros.* 58. Co., 80 F.3d 777, 788 (3d Cir. 1996); see also Fed. R. Evid. 611(a). The District Court acted within these boundaries.

D. Post-Verdict Discovery

Angelico contends the District Court improperly quashed a post-verdict subpoena for information from a non-party. We affirm the District Court's order under an abuse of discretion review. See *Brumfield v. Sanders*, 232 F.3d 376, 380 (3d Cir.

2000) (noting that the standard of review for scope or opportunity for discovery is abuse of discretion). It seems entirely reasonable, and in fact preferable, for the District Court to cut off discovery once a jury has returned a verdict. Angelico is correct that this Court affirmed a District Court's allowance of post-verdict discovery where such discovery was relevant to matters still pending before the court. *Hewlett v. Davis*, 844 F.2d 109, 115 (3d Cir. 1988). Unlike Hewlett, however, the only remaining issue before the District Court when Angelico sought additional discovery was unrelated to his discovery request.

Additionally, Angelico posits that the quashing of the subpoena was inappropriate because the party challenging the subpoena had no standing to do so. We disagree. We will thus affirm the District Court's order denying post-verdict discovery.

E. Immunity

The District Court found that Lehigh Valley Hospital was immune for proceedings it conducted regarding Angelico. The Health Care Quality Improvement Act of 1986 ("HCQIA") provides immunity for professional review boards acting in a disciplinary capacity, so long as four requirements are met. 42 U.S.C. § 11111-11112. The action must be taken: (1) in reasonable belief of furthering quality health care; (2) after reasonable fact-finding; (3) with adequate notice and a hearing; and (4) in reasonable belief the action is warranted based on the facts. 42 U.S.C. § 11112(a); see also *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 633 n.3 (3d Cir. 1996). We find, as did the District Court, that Angelico failed

to rebut HCQIA's presumption that the Hospital is entitled to immunity. 42 U.S.C. § 111 12(a).

III. CONCLUSION

For the reasons set forth, we will affirm the judgments entered by the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard L. Nygaard (Sic)

Circuit Judge

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2585

No. 01-2930

RICHARD J. ANGELICO, M.D.,

Appellant

V.

LEHIGH VALLEY HOSPITAL, INC.; SAINT LUKE1S HOSPITAL OF BETHLEHEM PENNSYLVANIA; EASTON HOSPITAL; PANEBIANCO-YTP HEART SURGEONS;

BETHLEHEM CARDIOTHORACIC SURGICAL ASSOCIATES, P.C.; BRIAN M. PETERS,

ESQ.; POST & SCHELL, P.C.; DECHERT,PRICE & RHOADS; JEFFREY G. WEIL

On Appeal from the United States District Court

for the Eastern District of Pennsylvania

(D.C. Civ. No. 96-cv-02861)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, AUTO, ROTH, MCKEE, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF and FISHER, Circuit Judges

The Petition for rehearing filed the Appellant (sic) in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered By the Court,

/s/ Richard L. Nygaard (Sic)

United States Circuit Judge

DATE: February 27, 2004

APPENDIX C

(Continued from previous page)

CLW/cc: Richard J. Angelico, M.D.
Richard F. Stevens,Esq.
Edward C. Mengel Jr., Esq.
David E. Edwards, Esq.
Howard M. Cyr III, Esq.
Wayne A. Mack Jr., Esq.

JURY CHARGE 3-15-01

1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD J. ANGELICO, M.D. : CIVIL ACTION
: : 96-2861

vs

: LEHIGH VALLEY HOSPITAL, INC.
ST. LUKE'S HOSPITAL OF
BETHLEHEM, PA., EASTON
HOSPITAL
PHILADELPHIA, PENNSYLVANIA
March 15, 2001
CHARGE

BEFORE THE HONORABLE J. CURTIS
JOYNER, J.
And a Jury

APPEARANCES:
ELLIOTT, REIHNER, SIEDZIKOWSKI
AND EGAN, P.C.
BY: HENRY F. SIEDZIKOWSKI, ESQUIRE
TIMOTHY S. KERR, ESQUIRE
DION G. RASSIAS, ESQUIRE
925 Harvest Drive
Blue Bell, Pennsylvania 19422
Counsel for the Plaintiff

STEVENS AND JOHNSON
BY: RICHARD STEVENS, ESQUIRE
GLENN GUANOWSKY, ESQUIRE

740 Hamilton Mall
Allentown, Pennsylvania 18101

Counsel for Lehigh Valley Hospital

2

WHITE AND WILLIAMS
BY: EDWARD C. MENGEL, JR., ESQUIRE
1800 One Liberty Place
Philadelphia, Pennsylvania 19103

Counsel for St. Luke's Hopital of
Bethlehem, Pennsylvania

DUANE, MORRIS & HECKSCHER
BY: WAYNE A. MACK, JR., ESQUIRE
1650 Market Street
Philadelphia, Pennsylvania 19103

Counsel for Easton Hospital

SIDNEY S. ROTHSCHILD RPR, CM
Official Court Reporter
601 Market Street, Rm. 1234
Philadelphia, Pennsylvania 19106
(215) 627-0184

3

THE COURT: You may be seated. Are you ready for the jury?

MR. SIEDZIKOWSKI: Yes.

MR. STEVENS: Yes.
THE COURT: Very well.
(Jury in the box.)
THE COURT: You may be seated.
Any members of the public audience, the courtroom door is about to be locked so that no one can come and go during the course of my instructions. So I'll make an exception if it gets to the time that your client's wife needs to leave, I'll allow her.
MR. SIEDZIKOWSKI: Thank you.
THE COURT: Ladies and gentlemen, we have obviously reached that point in the trial where I'm required to instruct you on the principles of law that you must apply and hopefully make them understandable to you.
Recall my earlier instructions given at the outset of this trial and those given during the trial. Consider them along with this final group of instructions as a connected series representing the body of principles of law that you must apply in the case before us.

4

Remember also I suggested to you and now instruct you again that it is the responsibility of the trial judge to decide all matters of law and therefore you must accept, follow and apply the instructions on the law.
I also told you, however, I am not the judge of the facts in this case. You are the sole and exclusive judges of the facts. And, remember, you are required in order to find or determine the facts, to assess, judge and determine the credibility, the truthfulness and accuracy of each and every witness who testifies in the trial.
Remember, that I instructed you upon the general rules of credibility some weeks ago. I

suggested to you that you should apply these general tests, general rules, when you assess the credibility of each and every witness.

Remember that I reminded you to consider the appearance and the demeanor of each witness as he or she testified from the witness stand. Consider the opportunity that each witness had to observe the matters about which that witness testified. Consider the witness' faculty for remembering and, of course, remembering accurately. Consider the witness' knowledge or lack of knowledge of the

5

subject matter about which that witness testified. Consider the interest of anyone who testified in the outcome or the result of the trial. Consider whether any witness indicated any bias or prejudice in favor of one party and against another. Consider the relationship of a witness to anyone else in the case. Consider also the probabilities of the testimony of each witness in light of the other testimony and evidence in the case, and certainly in the light of your everyday experience.

Remember, ladies and gentlemen you should consider the usual and the logical test used by all of us everyday to determine truthfulness and accuracy or the lack of truthfulness and accuracy.

You are not required to accept the testimony in this case, ladies and gentlemen, even thorough it may be uncontradicted, if you find such testimony to be incredible, that is untruthful or inaccurate.

However, the law does require you, members of the jury, to consider all the testimony that you find to be credible, that is accurate and truthful.

You will determine the credibility of the testimony of each witness and assign to that

25 testimony such weight as you, the jury, in your sole

6

1 discretion believes it properly deserves.
2 You have heard counsel's opening and
3 closing arguments and in their arguments they have
4 given you their respective views of what they
5 believe the evidence proves on the questions and the
6 issues that you the jury will have to decide.
7 While, of course, you should consider the arguments
8 of counsel, remember, such arguments are not binding
9 upon you and they are not evidence. Only the
10 testimony of witnesses in addition to the physical
11 and the documentary exhibits in this case that have
12 been submitted here, are evidence for your
13 consideration. Neither the arguments of counsel nor
14 the questions put to the witness by counsel or by
15 the Court are evidence in this case for your
16 consideration.
17 Only, remember again, only the answers
18 given by the witnesses under oath on the witness
19 stand, in addition to the documentary and physical
20 exhibits are evidence for your consideration.
21 Finally, ladies and gentlemen, as counsel
22 has mentioned to you, it is your recollection of the
23 evidence, not mine, not the recollection of counsel,
24 but yours and yours alone upon which you must rely
25 during the course of your deliberations.

7

1 I have now twice instructed you upon the
2 so-called general tests or general rules of
3 credibility. I should like to give you one further
4 rule, we call a special rule of credibility which
5 applies to special kinds of testimony introduced in
6 this case. The special kind of testimony for which
7 I refer is that of expert testimony. You will apply

the general tests of credibility when you come to consider this special kind of testimony and you will also apply the special rules upon which I now instruct you.

Let us consider the subject of expert testimony. Recall, ladies and gentlemen, we had a number of different types of experts who were qualified here before you and who have testified in this trial.

A witness who has special knowledge, skill, experience or education in a particular science, profession or occupation unlike a lay witness is permitted to give his or her opinion as an expert as to any matters in which the witness is skilled. In determining the weight to be given to such expert witness testimony, you, the jury, should consider the qualifications and the reliability of the expert witness and the reasons given for his or her

opinion.

I believe they were all male experts that were qualified as such, but, again, that's your recollection of the testimony that governs, ladies and gentlemen.

You are not bound by or required to accept an expert's opinion merely because he or she is a so-called expert. You, the jury, may accept an opinion or reject it in whole or in part, as in the case of the testimony of all other witnesses, that is for you and you alone to determine. Give the testimony of an expert witness, therefore, such weight, if any, to which you the jury deem it to be entitled.

In general, the opinion of an expert has value only when you the jury accept the facts upon which that opinion was based. This is true whether

the facts are assumed hypothetically, by the expert, come from personal knowledge or from some other proper source or from some combination of all three.

In resolving any conflicts that may exist in the testimony of expert witnesses, you are entitled to weigh the opinion of one expert against that of another. In doing this, you should consider

9

the relative qualifications and reliability of the expert witness as well as the reasons for each opinion and the facts and other matters upon which it was based.

If the expert has made it clear that his opinion is based on the assumption that a particular fact existed and from the evidence you find that it did not exist, you should give no weight to the opinion so expressed.

Similarly, ladies and gentlemen, if the expert has made it clear, that his opinion is based on the assumption that a particular fact did not exist, and from the evidence you find that it did exist, and that it was material, you should give no weight to the opinion as expressed.

Ladies and gentlemen, recall during the trial, I think it was close to the end that there was a stipulation agreed to by the parties. And at the time the stipulation was announced in open court here before you. And, as I instructed you at that time, I will instruct you again, these stipulations are accepted as evidence and you must regard such stipulated facts as proven.

Further, ladies and gentlemen, during the trial of this case certain testimony has been

10

presented to you by way of deposition, written and also video deposition. This consisted of sworn recorded answers to questions asked of the witness in advance of trial or even during the trial by the lawyers for the respective parties in the case. Such testimony is entitled to the same consideration and is to be judged as to credibility and weighed and otherwise considered by you the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand.

Ladies and gentlemen, remember I instructed you at the beginning of this trial that I may be called upon to make rulings of law on objections or motions made by lawyers. It is the duty of the attorney for each individual party in a case, to object when the other side offers testimony or evidence which the attorney believes is not properly admissible. You should not show prejudice against an attorney or client because the attorney made objection. You should not infer or conclude from any ruling or other comment I may have made that I have any opinion upon the merits of the case facing one side or the other.

As I stated, during the trial at times the Court, myself, I have asked a witness a question.

11

My purpose in asking the question was to bring out facts not then fully covered in the testimony.

Members of the jury, do not assume I hold any opinion on the matters for which my questions may have related.

Members of the jury, the number of witnesses offered by one side or the other does not in itself determine the weight of the evidence. It is a factor but only one of many factors which you

should consider whether the witness appears to be biased or unbiased, whether they are interested or disinterested persons are among the important factors which go to the reliability of their testimony. The important thing is the quality of the testimony of each witness. In short, the test is not which side or which party brings the greatest number of witnesses or presents the greater quantity of evidence, but which witness or witnesses and which evidence you consider most worthy of belief. Even the testimony of one witness may outweigh that of many, if you have reason to believe his or her testimony in preference to theirs. Obviously, however, where the testimony of the witnesses appear to you, to be the same quality, the weight or numbers assumes particular significance.

12

Members of the jury, the law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Ladies and gentlemen, you may find inconsistencies in the evidence, even actual contradictions in the testimony of witnesses do not necessarily mean that any witness has been willfully false. Poor memory is not uncommon. Sometimes a witness forgets. Sometimes he remembers incorrectly. It is also true that two persons witnessing an incident may see or hear it differently. If different parts of the testimony of any witness or witnesses appears to be inconsistent, you, the jury, should try to reconcile the

conflicting statements, whether the same or of different witnesses. You should do so if it can be done fairly and satisfactorily. If, however, you decide that there is a genuine and irreconcilable conflict of testimony, it is your function and duty to determine which, if any of the contradictory

13

statements you will believe.

Members of the jury, a witness may be discredited or impeached by contradictory testimony or by evidence that at some other time the witness has said or done something or has failed to do something which is inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such weight, if any, as you may think it deserves.

Members of the jury, if you decide that a witness has deliberately falsified his or her testimony on a significant point, you should take this into consideration in deciding whether or not to believe the rest of his or her testimony. You may refuse to believe the rest of his or her testimony. But, you are not required to do so.

Generally speaking, ladies and gentlemen, there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or

14

nonexistence of certain facts. An example of each would be, take today, March 15th, the year 2001.

Each of you could testify that today felt like an early spring morning, as you came to the courthouse. Each of you experienced that. You were an eyewitness to that. You came from your various homes throughout the Commonwealth of Pennsylvania, you traveled here to the courthouse. You walked in from outside. You experienced that. That's an example of direct evidence.

An example of circumstantial evidence, as most judges give, say for example at the conclusion of your day here, when you go outside the courthouse, you observe that all the sidewalks are damp, that there was water running down the gutter. That there was spots of water on the parked cars. That people were carrying umbrellas by their side. You could assume from these various facts that it must have rained while you were inside the courthouse. That's an example of circumstantial evidence.

As a general rule, ladies and gentlemen, the law makes no distinction between direct or circumstantial evidence, but simply requires that you, the jury, find the facts in accordance with the

preponderance of all the evidence in the case, both direct and circumstantial.

Members of the jury, you are to consider only the evidence in the case, but, in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw from facts which you find have been proved such reasonable inferences which seem justified in the light of your experience.

Inferences are deductions or conclusion

which reason and common sense lead the jury to draw from the facts which have been established by the evidence in the case.

Ladies and gentlemen, I instruct you as to your notes, the following: Any notes that you have taken during this trial are only aids to your memory. If your memory differs from your notes, you should rely on your memories and not on your notes. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater

16

weight than the recollection or impression of each juror about the testimony.

And, recall in reference to your notes that any notes that you have taken in reference to counsel's statements, closing arguments, opening arguments, they are not evidence. Only the testimony from the witness stand and any documentary and physical exhibits that have been admitted are evidence for your consideration.

Members of the jury, in civil cases such as this one, the plaintiff has the burden of proving those contentions which entitle him to relief. When a party has the burden of proof on a particular issue, his contention on that issue must be established by a fair preponderance of the evidence; the evidence establishes a contention by a fair preponderance of the evidence if you are persuaded that it is more probably accurate and true than not.

To put it another way, ladies and gentlemen, think, if you will, of an ordinary balance scale with the pan on each side. On to one

side of the scale place all the evidence favorable to the plaintiff. On to the other, place all the evidence favorable to the defendant. And here we

17

have three individual defendants and we will go through the individual allegations and claims that the plaintiff has brought against these individual defendants. Some are included in the same claim, some are not.

If, after considering the comparable weight of the evidence, you feel that the scales tip ever so slightly or to the slightest degree in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip in favor of the defendant here, the defendants, or are equally balanced, your verdict must be for the defendant.

As you know, ladies and gentlemen, the plaintiff in this case is Richard Angelico, M.D. I will refer to him as the plaintiff or Dr. Angelico. The defendants are Lehigh Valley Hospital, Inc., St. Luke's Hospital of Bethlehem, Pennsylvania, Easton Hospital and I will refer to these entities collectively as defendants or each individual defendant individually by name.

Ladies and gentlemen, when you go back to the jury room, you will take with you what is captioned the verdict slip and I'm going to pass out a verdict slip to each of you so that you will be able to follow along with the particular questions

18

and the issues that you have to resolve in dealing with the questions. And I'm going to take this moment to ask Mr. Rothschild to pass these out among you.

(Verdict slips given to jurors.)

THE COURT: Very well. Let us deal with the plaintiff's allegations in his complaint that the defendants violated the Sherman Antitrust Act, that he was injured and suffered damages as a result of such violation.

Plaintiff also alleges that Lehigh Valley Hospital and St. Luke's Hospital breached their contract with Dr. Angelico and that St. Luke's Hospital has intentionally interfered with his business relationship.

Obviously, ladies and gentlemen, the defendants deny any of the plaintiff's claims and they further deny that they violated the Sherman Act in wrongfully interfering with the plaintiff's existing business relationship or any breach of contract.

The first question on your verdict slip that you will have to answer: Has the plaintiff proved by a preponderance of the evidence that one or more of the defendants engaged in a combination,

contract or conspiracy to restrain trade, in Violation of Section 1 of the Sherman Act, by:

A) by a concerted refusal to deal with Dr. Angelico?

And then it lists all three defendants who the plaintiff has brought this claim against.

Obviously, I have to instruct you on the elements of this section of the Sherman Antitrust Act and how it applies also to section B. Section B is just another claim brought by the plaintiff that alleges that this combination or contract of conspiracy to restrain trade was caused by an illegal arrangement, the elements for each of these is the same.

And, I ask you to pay close attention to my

instructions on the Sherman Act.

Initially, ladies and gentlemen, the purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging to the fullest extent practicable free and open competition in the marketplace and by preventing unreasonable restraint or monopolization of any business or industry so that the consuming public may receive better goods and services and lower costs. It is the goal of the Sherman Act to protect

competition, not individual competitors.

Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies that unreasonably restrain trade and make it illegal for any person to engage in any such contracts, combination or conspiracy.

I tell you, ladies and gentlemen, that the term person as I will use it in these instructions include not only every individual but also every corporation, partnership, and every other organization of any kind.

I further instruct you that a corporation can act only through its officers, employees, agents and attorney. Any act or omission of an officer, employee, agent or an attorney within the scope of his or her employment is the act or omission of the corporation for which he or she was then acting.

I further instruct you that any act outside the scope of employment is not an act or omission of the corporation.

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging to the fullest extent possible free an open enterprise in the marketplace.

Section 2, which we will deal with shortly

21

after we go through the requirements for Section 1 prohibits monopolizing or attempting to monopolize any part of the trade in interstate commerce.

Let us look at the elements of what the plaintiff must prove by a preponderance of the evidence for a claim under Section 1 of the Sherman Act.

In order to establish a claim under Section 1 of the Sherman Act, plaintiff must prove each of the following elements by a preponderance of the evidence.

First, that the defendants entered into a contract, combination or conspiracy with other providers of cardiac surgical services of the hospital and/or surgical groups to foreclose plaintiff and other competitors from the market for adult open heart surgical services.

Second, that the alleged contracts, combination and conspiracy unreasonably restrained trade.

Third, that the contracts, combination or conspiracies occurred in or affected interstate commerce.

Fourth, that the foreclosure of the plaintiff from competing in the relevant markets was

22

a material cause of the damage to his business or profit.

The plaintiff alleges that the defendants participated in a conspiracy to restrain trade.

A conspiracy is an agreement by two or more persons, remember my definition of persons, to accomplish some unlawful purpose or to accomplish a lawful purpose by unlawful means.

Thus, the plaintiff must have proved both of the following elements by a preponderance of the evidence.

First, that the alleged conspiracy existed.

And, second, that the defendant and here we are talking about each defendant because all three are charged under both sections of Section 1, became a member of that conspiracy; knowingly means voluntarily and intentionally; and not because of mistake or accident or other innocent reason.

A conspiracy is a kind of partnership in which each person found to be a member of the conspiracy is liable for all acts and statements of the other members made during the existence of and in furtherance of the conspiracy. To create such a relationship; two or more persons must enter into an

agreement that they will act together for some unlawful purpose or to achieve a lawful purpose by unlawful means.

As you can see one person can't be in a conspiracy. Two or more is required.

To establish the existence of a conspiracy, however, the evidence need not show that its members entered into any express formal or written agreement; that they met together or that they directly stated what their object or purpose was or the details of it or the means by which they would accomplish their purpose. The agreement itself may have been entirely unspoken. What the evidence must show to prove that a conspiracy existed, is that the alleged members of the conspiracy in some way came to an agreement to accomplish a common purpose. It is the agreement to act together that constitute the offense, whether the agreement actually is carried

out or whether it succeeds or fails does not matter.

A conspiracy may be formed without all parties coming to an agreement at the same time. As where competitors without previous agreement separately accept invitations to participate in a plan to restrain trade. The unlawful agreement may

24

be shown if the proof establishes that the parties knowingly worked together to accomplish a common purpose. It is not essential that all persons acted exactly alike, nor is it necessary that they all possessed the same motive for entering the agreement.

Direct proof of an agreement may not be available. A conspiracy may, however, be disclosed by the circumstances or by the acts of the members. Therefore you may infer the existence of an agreement from what you find the alleged members actually did as well as from the words they used. Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together and discussed common aims and interests does not establish the existence of a conspiracy unless it tends to exclude the possibility that the persons were acting independently. If they acted similarly but independently of one another, without any agreement among them, then there would be no conspiracy.

The evidence does not have to show that all of the means or methods claimed by plaintiff were agreed upon to carry out the alleged conspiracy; nor

25

that all of the means or methods that were agreed

upon were actually used or put into operation; nor that all the persons alleged to be members of the conspiracy actually were members. What the evidence must show is that the alleged conspiracy of two or more persons existed, that one or more of the means or methods alleged was used to carry out its purpose and that defendant knowingly became a member of the conspiracy.

In determining whether an agreement has been proved, you must view the evidence as a whole and not piecemeal. In considering the evidence, you first should determine whether or not the alleged conspiracy existed. If you conclude that the conspiracy did exist, you should next determine whether the defendant knowingly became a member of that conspiracy with the intent to further its purposes.

Members of the jury, before you can find a defendant was a member of a conspiracy alleged by the plaintiff, the evidence must show that the defendant knowingly joined in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. To act knowingly means to act voluntarily and intentionally and not because

26

of mistake or accident or other innocent reason. A person who has no knowledge of a conspiracy but happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

The membership of a defendant in a conspiracy must be based only on evidence of its own statements or conduct. In determining whether any defendant was a member of the alleged conspiracy, you should consider only the proof of that

particular defendant's statements and conduct, including any evidence of the defendant's knowledge, or lack of knowledge, status and participation in the events involved, and any other evidence of participation in the conspiracy alleged.

In determining whether an agreement or mutual understanding have been proved, you must view the evidence as a whole and not piecemeal, as I stated to you.

When relying -- and I tell you, ladies and gentlemen, that the plaintiff contends that the agreements or conspiracy that he alleged is evidence by both direct and circumstantial evidence.

When relying on circumstantial evidence to prove the existence of a conspiracy, a plaintiff

27

must first show a motive for entering into a conspiracy. In other words, the plaintiff must show that the conspiracy alleged is an economically reasonable one. Defendants, however, need not share the same motive. All that is necessary is that they each had a motive to conspire. If a motive for the conspiracy is evident, then you must decide whether the plaintiff has adduced evidence that reasonably tends to prove a commitment on the part of the alleged coconspirators to enter into a scheme designed to achieve an unlawful objective; but the evidence need not show that the coconspirators specifically intended to restrain trade.

Members of the jury, a plaintiff can establish an antitrust conspiracy using circumstantial evidence under a doctrine known as conscious parallelism. The theory of conscious parallelism is one where competitors engage in uniform conduct which allow the jury to infer conspiracy against a competitor. In a conscious

parallelism case, uniform conduct by the alleged coconspirators is the first step to establish a conspiracy. The plaintiff then also must demonstrate the existence of certain plus factors. The term plus factors refers to the additional facts

28

or factors required to be proved as a prerequisite to find that parallel actions amount to a conspiracy. These plus factors tend to exclude the possibility that the defendants acted independently. One example of plus factors is whether cooperation between the defendants was essential to the successful operation of the plan? Another example would be if the alleged exclusionary conduct would be contrary to the independent economic interests of the hospitals.

In order to prove the plus factors, plaintiff must show, first, the defendants acted in contradiction of their own independent economic interest.

Second, the defendants had a motivation to enter into an agreement.

Members of the jury, I further instruct you as it relates to this particular principle, that when considering the fact that the defendants' behavior, the defendants' behavior may be no more than a result of exercise of independent judgment in response to identical or similar market conditions, a business may lawfully adopt the same prices, and conditions of sale, or other practices as its competitors, as long as it does so independently and

29

not as part of an agreement with one or more of its competitors.

Therefore, the fact that the defendants may

have acted similarly is not by itself sufficient to prove the existence of the alleged agreement. You may consider the defendant's parallel conduct along with other evidence in deciding whether the defendant's conduct was the result of an agreement and not the result of separate decisions made by each defendant entirely on his own. To be considered as evidence of an agreement, such other evidence must tend to exclude the possibility that the defendants acted independently. Such evidence might be that their conduct, parallel conduct is contrary to the best interests of some of the defendants, lack legitimate business reasons or occur only after there were communications between defendants on the subject; or that the defendants had a motive to engage in the alleged unlawful behavior. If you believe that the defendants parallel business conduct was inconsistent with the exercise of independent business judgment, then you may consider such conduct along with all of the other evidence in deciding whether the alleged agreement existed.

30

I further instruct you, members of the jury, it is not necessary for the plaintiff to join as defendants in this case all persons who may have participated with the defendants in the alleged combination.

A person injured by such a combination may recover against one or all of those participating and he may enforce his right or recovery against one or some or all at his election. So you are hereby instructed that it is immaterial that any other member of the combination may have not been joined in this suit by the plaintiff.

Further, I instruct you, members of the

jury, that if you conclude that the plaintiff's claim makes no economic sense, the plaintiff must come forward with more persuasive evidence than would otherwise be necessary to prove a conspiracy. It must prove evidence that tends to exclude the possibility that the defendants acted independently.

I further instruct you, members of the jury, that a hospital cannot, I repeat cannot conspire with its own medical staff to commit an antitrust violation.

I further instruct you, that a hospital's

31

selection of medical staff are presumed to be based on legitimate, medical and business reasons and the plaintiff has the burden of overcoming this presumption.

As I stated earlier, the second element of Section 1 claims, the first two claims that you will have to deal with on the verdict slip, requires the plaintiff to prove that the actions taken pursuant to the conspiracy constituted an unreasonable restraint of trade. You must decide whether all the circumstances of the case and the alleged restrictive practices imposed an unreasonable restraint on competition.

The test is whether the alleged restraint imposed by the defendant's conduct is such that it may suppress or even destroy competition. You must consider the facts peculiar to the adult open heart surgery business where the alleged restraint was applied. The conditions before and after the alleged restraint was imposed and the nature of any restraint, its effects, actual or probable.

Relevant facts are the history of any restraint, the evil believed to exist, the reasoning

for adopting the remedy and the purpose or end sought to be obtained.

32

Section 1 of the Sherman Act is also violated when two or more competitors agree or come to a mutual understanding not to deal with another competitor, such as the refusal to enter into new business relationships or the terms of existing relationship.

If you find that more than one of the defendant competitors refused to deal with plaintiff and that the refusal to deal was pursuant to an agreement or mutual understanding and not the result of independent business judgment, then you must find that the defendants entered into a contract, combination, or conspiracy that is unreasonable as a matter of law.

In order to prove that the restraint was unreasonable, the plaintiff must prove that the contracts, combination or conspiracies, may suppress or even destroy competition.

To show this, the plaintiff must prove by a preponderance of the evidence, first that the restraint or practice through the alleged conspiracy may suppress or even destroy competition.

Second, that the harmful effects on competition outweigh any beneficial effects on competition.

33

In determining whether the restraint is reasonable or unreasonable, you may consider the following factors:

First, the nature of the adult open heart surgery market.

Second, the facts which are peculiar to the

adult open heart surgery market.

Third, the nature of the restraint and its effects, actual and probable.

Fourth, the history of the restraint.

And fifth, the reason for adopting the particular practice which is alleged to be restrained.

Members of the jury, plaintiff also is challenging the defendant's exclusive dealing arrangements in Lehigh Valley, which prevented referring physicians from dealing with any cardiac surgeon, including the plaintiff.

An exclusive dealing arrangement is a type of a contract, combination or conspiracy specifically inclusive. Dealing refers to an agreement under which a buyer promises to buy its requirements of a service exclusively from a particular seller or a seller agrees that all of its sales will be exclusively to one buyer.

34

In order to establish an antitrust violation, plaintiff must have proved by a preponderance of the evidence, that the defendants exclusive dealing was unreasonable, and substantially lessened competition in the relevant market.

In considering the effects of an exclusive dealing arrangement, ladies and gentlemen, you should consider their effect now and in the future. Only if you find that the plaintiff has proven a substantial lessening of competition due to defendant's exclusive dealing arrangement can you find in favor of the plaintiff.

In deciding this issue, you may look to the overall effect of the defendant's conduct in the relevant market.

That is, you may assess the defendant's aggregate methods of conduct in the relevant market to determine whether any exclusive contract, combination, or conspiracy created entry barriers which foreclose competition in an unjustifiable manner.

You should consider the percentage of the relevant market closed off by or tied up because of the exclusive dealing arrangements.

35

In this regard, you may consider how many cardiac surgeons are in the market and the exclusive dealing arrangements, significantly limits the opportunity for competing cardiac surgeons to enter or remain in the market.

If competing -- if a competing surgeons were forced from or kept out of the market, this may tend to show the exclusive dealing arrangements may be adversely affecting competition in the market.

It is not enough to look solely at the percentage of the market that is now closed to competing sellers by the defendant's exclusive dealing arrangements. Rather, you must consider the probable effect both now and in the future that the arrangements will have on competition in the market.

If you find that the defendants exclusive dealing does not and will not substantially lessen competition, then you must find in favor of the defendants.

You should also consider such factors as the circumstances under which defendants set up their exclusive dealing arrangements and what reason it had for doing so.

You should also consider the relative

36

bargaining strengths of the parties to the arrangements. If the parties had relatively equal bargaining strengths then the arrangements are less likely to be unreasonable. If the exclusive dealing arrangements challenged by the plaintiff, adversely affect market structure, by increasing concentration or by eliminating or substantially weakening an important competitor, the requisite adverse affect on competition may be established. If the defendants have shown that the exclusive dealing had produced any helpful effects, you must then consider plaintiff's evidence that any helpful effect could have been achieved in a substantially less restrictive manner.

Specifically, you should ask whether the exclusive dealing was a good way of accomplishing any legitimate objective.

Second, you should ask whether there is a reasonable alternative for accomplishing the legitimate objective that restrains competition, substantially less, you must then weigh the harm and benefits - those that could not be achieved in a substantially less restricted manner - to determine if the challenged behavior is reasonable on balance.

37

The third element referred to requires that the plaintiff must establish by a preponderance of the evidence that acts in furtherance of the conspiracy occurred in or affected interstate commerce.

The Sherman Act applies only to restraints or monopolization of interstate commerce. Activities in commerce are covered as well as those

affecting interstate commerce. The latter concept is a broad one and is satisfied by conduct that is shown as a matter of practicable economics to have a not insubstantial effect on interstate commerce. The expression a not insubstantial means that you must look for the existence of interstate effects not their magnitude. The effects need not be substantial, or even large; anything more than de minimis is sufficient.

Members of the jury, I instruct you that restraint of trade may be judged in the framework of a relevant market. And these definitions also apply to the monopoly charge I'll give you shortly.

Defining a relevant market may be useful before you make a judgment about whether the defendant has substantially harmed competition.

The relevant market which plaintiff claims

38

is applicable to his claim is the adult open heart surgery in the Pennsylvania Lehigh Valley. The relevant market must be determined by reference to one, a product/service market. Two, a geographic market.

The product service market includes products which are interchangeable as a practicable matter from the buyer's point of view. This does not mean that the products or services must be identical to be in the same relevant market. It means that they must be, as a matter of practical fact, the actual behavior of buyers substantially or reasonably interchangeable products or services.

One basic test is whether changes in the price of a particular service proposed as a relevant product market causes a considerable number of patients to switch from that service to another. If the price change does not cause a switch then the

particular service may be a separate market. Thus, another factor helpful in determining whether a particular service constitutes a separate product market includes the ability to price discriminate. There can be more than one relevant product market within a market, that meets the aforesaid tests, there may be smaller groups of products or services

39

that considered by themselves also meet the same test. If so, that grouping of products may also be a relevant market and it is referred to as a submarket.

Secondly, the relevant geographic market generally consists of the area or areas in which these parties and their competitors operate and for which consumers can practically turn for their services. In some instances the geographic market can be as small as a single hospital or a single community. Under other circumstances it may be as large as a national market. The plaintiff contends that the geographic market in this case, is the localized market in which referring physicians on behalf of patients seek adult open heart surgical services. Specifically, the plaintiff contends that the relevant geographic market is the Lehigh Valley.

Once you have determined relevant market, you then must consider whether the alleged restraints of trade, i.e., the conspiracy and acts in furtherance had a substantially harmful effect on competition in the relevant market. You should consider the nature of the restraint, the history of the restraint, the structure of the market and the

40

defendant's position in the market; specifically,

whether the defendant possessed what is called market power.

You may look to the overall effects of the defendant's conduct in the relevant market; that is, you may assess the defendant's total or aggregate pattern of conduct in the relevant market to determine whether any exclusive contracts, combinations or conspiracy create entry barriers which foreclose competition in an unjustifiable manner. You should consider the percentage of the relevant market closed off by or tied up because of the alleged contracts, combination or conspiracy. In this regard, members of the jury, you may consider how many hospitals are equipped to provide adult open heart surgery, how many cardiac surgical groups exist, how many surgeons practice adult open heart surgery in the market. Whether the exclusive dealing arrangements significantly limit the opportunity for competing surgical firms of independent surgeons to enter or remain in the market. If competing firms or independent surgeons were kept out of the market or left the market, this may tend to show the exclusive dealing arrangements may be adversely affecting competition in the

market. On the other hand, if competing sellers are coming into the market or staying in the market, this may tend to show that the exclusive dealing arrangement may not be affecting competition in the market.

You heard me mention market power and market power is defined as the power to force a purchaser to do something that he would not do in a competitive market. It is, for example, the ability to raise prices charged purchasers to levels above those that would be charged in a competitive market.

It is also the ability to require consumers to accept terms that they would not accept in a competitive market. In deciding whether defendants have market power, we need not engage in a detailed market analysis. If you find that the defendants have a dominant position in a relevant market such that there are no readily available alternative choices for an appreciable number of patients, you may find that the defendants have market power.

Another way of determining whether defendants have market power is to determine the defendants' market share. The existence of market power ordinarily is inferred from the defendant's possession of a predominant share of the market.

42

There are various ways to measure market share but whatever measure you use must be reasonable and consistently applied.

Defendants jointly contend that the relevant product market is made up of two independent product markets. The market for physicians supplied components of adult open heart surgery and the hospital supply services. The plaintiff contends that even assuming such markets, defendants physician groups and hospitals together maintain market and monopoly power.

Because there is a relationship between market power and monopoly power, you may conclude that the defendants have market power if you find that it has a monopoly power. Monopoly power is the power to control prices or to exclude or economically inhibit competitors in a relevant market.

Thus, if you find that the defendants have been able to exclude or economically inhibit

competitors in a relevant market, then you may find that the defendants have market power.

However, the defendants may have market power without having monopoly power. While market power requires no specific market share, it must be

43

sufficient when taken together with other factors such as barriers to entry that the defendants have a dominant position in a relevant market.

To exclude competition does not mean to prohibit all competition but to have the power to place major obstacles in the way of any company or individual persons who desire to enter or remain in that particular market.

Ladies and gentlemen, the last element for decision is four, dealt with the entry that would occur to the plaintiff pursuant to the violation of Section 1.

I am going to wait until I go through the elements on Section 2 to get to that fourth element because it is also required in Section 2.

Before I go to Section 2 dealing with the monopoly claims that are contained on page 2, the second page, the attempt to monopolize and conspire to monopolize, I tell you again, each of these essential elements have to be proven by the plaintiff, by the preponderance of the evidence.

And, so before I begin the monopolization aspect I am going to ask each of you to stand up and stretch a little bit, get oxygen in your lungs. I know after lunch it is difficult, sometimes your

44

eyes get a little weak and I'm saying a lot of words to you all in one full swoop. It is sometimes

difficult to digest everything I'm spewing out. I'll give you a break and stretch everyone.

That includes lawyers and anyone else. All right. I'm going to do it also. . It is not an all day break. I'm only teasing, I am only teasing.

Members of the jury, now I instruct you on the second of the plaintiff's antitrust claims dealing with monopolization. Remember that Section 1 of the Sherman Act refers to conspiracy while Section 2 pertains to the willful maintenance of monopoly power.

Plaintiffs monopoly claim is separate and independent from his conspiracy claim.

The plaintiff alleges that the defendants have violated Section 2 of the Sherman Act by willfully maintaining its monopoly power. And, here, you will see as to each of these claims that they are somewhat different. In the relevant adult open heart surgery market in Pennsylvania, Lehigh Valley, in order to win on the claim of monopolization, under Section 2 of the Sherman Act, the plaintiff must prove each of the following elements by a preponderance of the evidence.

45

First, that the defendants possessed a monopoly power in the relevant market.

And, second, that the defendants willfully maintained that power through restricted or exclusionary acts or practices.

Third, that the defendants activities occurred in or affected interstate commerce.

Fourth, that plaintiff was injured in his business or property because of the defendant's restricted exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these

elements, then you must find for the defendants and against the plaintiff on his monopolization claim.

Members of the jury, it is an essential element of the plaintiff's monopolization claim under Section 2 of the Sherman Act that the defendants have a monopoly power in the relevant market.

You have already been instructed, however, as to what a relevant market is with respect to the plaintiff's claim under Section 1 of the Sherman Act. For instance a relevant market is made up of a relevant product market and a relevant geographic market.

46

When you determine what the relevant market and geographic markets are for purposes of the plaintiff's claim under Section 2 of the Sherman Act, you may apply the same tests you were already told about in connection with the plaintiff's Section 1 claims.

If after considering all the evidence, you find that the plaintiff has proved the existence of both a relevant product market and a relevant geographic market, then you must find that the plaintiff has established the relevant market requirement and consider the remaining elements of his monopolization claim.

Members of the jury, if you find that a relevant market has been proved, you should then determine if the defendant has monopoly power in that market.

Monopoly power is the power to dominate or control the market. This means the power to control prices or exclude or economically hinder competition in the relevant market. The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by

his competitors, if equivalent goods, without the company suffering a substantial loss of business to

47

competitors. Thus, for example, if the defendant raised its prices but eventually had to lower them to the level of the prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market or by preventing new competition from entering that market. To establish the possession of monopoly power, the plaintiff need not prove, however, that prices were raised or that competition actually was excluded, but only that the defendant had the power to raise prices or exclude or economically inhibit competitors. All the plaintiff must show is that the defendants had the power to raise prices or exclude or economically hinder competition.

Further, to conclude that the defendant had monopoly power, you need not find the defendant could sell its services at any price that it desired or that it had no competition whatsoever. A company may face some competition in a market and still have had monopoly power. On the other hand, if you find that the defendant did not have power to control prices or to exclude competition, then you must

48

conclude that it did not have monopoly power.

On the other hand, if they are numerous and vigorous or have large or increasing shares in the market, this may be evidence that the defendant does not have monopoly power.

You may consider the history of entry into

and the exit from the market by other individuals or company. Entrance of companies or individuals into the market may indicate that the defendants lack monopoly power. On the other hand, departures of individuals or companies from the market and or the failures of companies to enter that market may indicate that the defendant had monopoly power.

Monopoly power may be shown by evidence that defendant has the power to exclude or economically inhibit competitors. The existence of monopoly power may also be shown by evidence that the defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that defendants earned extraordinarily large profits over a long period of time.

If you find that the defendants had monopoly power, then you must find the plaintiff has established this requirement and must consider the

remaining elements of its monopolization claim.

If you find that the defendants did not have monopoly power, then you must find the defendants did not violate Section 2 of the Sherman Act and you must accordingly find for the defendants and against the plaintiff on this claim.

Ladies and gentlemen, I further instruct you that there are a number of factors that you can consider, none of which is necessarily controlling. For example, you have heard evidence about the defendant's market share. You may infer whether or not monopoly power exists from the defendant's market share.

Market share in this case can for example be a firm's share of a total number of procedures performed, total revenues earned, capacity or

reserve, expressed as a percentage of the whole. There are a variety of ways to measure market shares, but whatever measure you use must be reasonable and consistently applied.

If you determine that the defendants' share of the relevant market is 80 percent or higher, that is strong evidence of the existence of a monopoly power. If you determine that the defendant's market share is somewhere between 50 percent and 80

50

percent, you may infer the existence of monopoly power from that share. The inferences are stronger the higher the defendants share is within that range. You may also consider the trend in the defendants' market share. A declining market share may indicate the absence of monopoly power. Though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of the defendant's competitors. If these are few, weak or have small or decreasing market share, so they do not offer substantial competition to the defendants in the relevant market, this may tend to indicate that the defendant has a monopoly power.

I further instruct you, members of the jury that the plaintiff must prove that the defendants willfully maintained monopoly power in the relevant market through restricted or exclusionary acts or practices instead of the ordinary means of competition.

To prove that the defendants acted willfully, plaintiff must show that it engaged in restrictive or exclusionary acts or practices with the conscious object of furthering its dominance of the relevant market or that this was the necessary

51

and direct consequences of its conduct or business arrangements. You do not have to find that the defendants specifically intended to monopolize the relevant market. I say the defendants because the defendants may apply to these general criteria. But, as you will see on page two, dealing with each individual section, section A dealing with monopolizing the market for cardiac thoracic surgery in Lehigh Valley, there's only one defendant, one defendant that the plaintiff is proceeding against. On section B there's only one defendant and both are Lehigh Valley. On these theories of claims that the plaintiff has brought on Section C, dealing with conspiracy, the plaintiff's claim is against all three, that's why I used all defendants in plural because these are general requirements under the essential section of Section 2.

Proceeding on. A company may not be found to have willfully maintained monopoly power if it has maintained that power solely through the exercise of superior foresight and skill, because of this its economic efficiency, or because the relevant market is so limited, that it is impossible to provide the service without supplying the whole demand for the service. The acts or practices that

52

result in the maintenance of monopoly power must represent something more than normal competitive behavior by a firm or extraordinary commercial success. They must represent conduct that has unnecessarily excluded or handicapped competitors to engage in fair competition.

If you find that the defendants willfully maintained monopoly power, then you must find that

the plaintiff has established this element and you must consider the remaining elements of this monopolization claim. If you find that the defendant did not willfully maintain monopoly power, then you must find that he did not violate Section 2 of the Sherman Act and you must accordingly find for the defendant and against the plaintiff on this claim.

I further instruct you, members of the jury, in considering whether the means or purposes used by a monopolist to maintain his monopoly were anticompetitive or exclusionary, you must draw a distinction between practices which tend to exclude or restrict competition from the success of a business achieved through offering a superior product or service, a well-run business, or even luck; for example, a firm that acquires a monopoly

53

position is not barred from taking advantage of its size in creating an organization that can efficiently service its customer's needs. These benefits are a size not a monopoly power.

It is unlawful, however, for a monopolist to engage in conduct that unnecessarily excludes or handicaps competitors in order to maintain his monopoly.

Conduct unnecessarily excludes or handicaps competitors when it has the effect of impairing competition or furthering any domination of the relevant market or submarket and does not benefit consumers by making a better product or service available, or by increasing efficiency.

Conduct is exclusionary if it is economically irrational for the monopolists to act this way but for their desire to eliminate competition from the relevant market. Stated

another way, when there is no other possible explanation for the economically irrational behavior there is a strong inference that it was taken for the purpose of harming competitors than for advancing the defendant's business. Thus, a monopolist's conduct is unlawful under Section 2 of the Sherman Act if it's anticipated benefits are

54

dependent on its tendency to discipline or eliminate competition.

Ladies and gentlemen, I instruct you that ordinarily a company may deal or refuse to deal with whomever it pleases as long as it acts independently. It is unlawful, however, for a competitor to engage in concerted or exclusionary conduct, including refusal to deal that unnecessarily excludes or handicaps competitors in order to maintain its monopoly in a relevant market. If you find that the defendants had monopoly power, in the market, for the adult open heart surgery market in Lehigh Valley and sought to exclude plaintiff from the market and deny him privileges at the defendant's hospitals in furtherance of a purpose to exclude competition in that market then you should find for the plaintiff on this issue. If, however, you find that this refusal to deal was primarily motivated and supported by a legitimate business reason then the defendants have not violated the law because of its refusal to deal.

In determining whether the defendants alleged refusal to deal was done as a purposeful means of monopolizing, the only question is whether

55

the challenged conduct can fairly be categorized as

restrictive or exclusionary. You need find that the defendant's conscious object was to maintain a monopoly. In your deliberations on this issue, you should focus on the effect of the defendants' conduct on plaintiff, it's impact on buyers or consumers and whether it has impaired competition in an unnecessarily restrictive way.

I further instruct you, ladies and gentlemen, that if you find plaintiff has proven the existence of a relevant market, you should then consider whether the plaintiff has shown that the defendants' various agreements, covenants were exclusionary acts or practices which substantially foreclosed a significant percentage of the market from other competitors without having the tendency to create a monopoly in that market.

In order to prove that, the plaintiff must have shown by a preponderance of the evidence that these agreements either analyzed collectively or separately, unreasonably restrained trade in a relevant market by excluding competitors and preventing entry into the market.

In deciding this issue, you may consider the structure of the relevant market and the

56

percentage of the market closed off by or tied up because of the various agreements and covenants defendants had in place. In this regard, you may consider how many cardiac surgical groups there are in the market and whether the agreements and covenants significantly limit the opportunities for competing firms to enter or remain in the market. If competing firms were kept out of the market, or left the market, this may tend to show the agreements and the covenants are adversely affecting competition in the market.

On the other hand, if competing sellers are coming into the market or staying in the market, this may tend to show that the agreements and covenants may not be affecting competition in the market.

If you conclude that the various agreements and covenants unreasonably restrained trade, it is proper to declare them to be restrictive or exclusionary.

Again, that is for your determination, ladies and gentlemen.

I further instruct you, members of the jury, that plaintiff alleges that the defendant made deceptive and false statements about the plaintiff

57

in order to exclude him or to inhibit his abilities to compete in the market for the adult open heart surgery market in the Lehigh Valley, Pennsylvania. A monopolist making deceptive statements about a competitor can constitute exclusionary acts or practices if they are material and likely to be relied upon by consumers in the relevant market. Thus, if defendants have monopoly power in the relevant market and have made the deceptive statements about his rivals, which would be relied upon by consumers of his service, it is proper to declare them to be restrictive or exclusionary.

And again, ladies and gentlemen, as I stated earlier, dealing with question three, I'll go through these in a short while.

Question three says: Has the plaintiff proved beyond a preponderance of the evidence that one or more of Defendants, in violation of Section 2 monopolized the market for cardiacthoracic surgery in the Lehigh Valley?

Here, it is monopoly that is being alleged

and claimed by the plaintiff is against Lehigh Valley Hospital. They are saying that Lehigh Valley monopolized the market for cardiothoracic surgeons.

I'm about to instruct you on the attempt to

58

monopolize, the elements of subsection B, then next I'll define what the elements are for conspiracy to monopolize the market for cardiothoracic surgery that involves all three defendants.

All right, moving along. The plaintiff alleges that it was injured by the defendants unlawful attempt to monopolize the market for adult open heart surgery market in the Lehigh Valley.

Again, the plaintiff here alleged that the attempt is Lehigh Valley Hospital -- in order to win on its claim of attempted monopolization, plaintiff must prove each of the elements by a preponderance of the evidence.

First, that the defendants had a specific intent to achieve monopoly power in a relevant market.

Second, that the defendants engaged in exclusionary or restrictive conduct in furtherance of this specific intent.

Third, that there was a dangerous probability that the defendant would sooner or later achieve its goal of monopoly power in the relevant market.

Fourth, that the defendant's activities occurred in or affected interstate commerce.

59

Fifth, that the plaintiff was injured in his business or property because of the defendant's restrictive or exclusionary conduct.

And, again, the last element I'll get to at

the end because it involves each of these claims, it is basically a claim for damages and causation of those damages.

Members of the jury, if you find that the plaintiff has proved a relevant market, you must then decide whether the defendant had the specific intent to monopolize that market. In other words, you must decide if the evidence showed that the defendants acted with conscious objective of acquiring the power to control prices or to exclude or economically inhibit competitors in that market.

There are several ways as I stated previously in which plaintiff may prove that defendants had the specific intent to monopolize. There may be evidence of direct statements of defendants' intent to obtain a monopoly in the market for adult open heart surgery market in the Lehigh Valley. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendants at about the time of the conduct in question, or by testimony

60

concerning statements made by the responsible officers or employees of defendants.

Even if you decide that the evidence does not prove directly that the defendant actually intended to obtain a monopoly specifically, specific intent may be inferred from what the defendant did. For example, if the evidence showed that the natural and the probable consequence of the defendants' conduct in the relevant market was to give the defendant control over prices or to exclude or economically inhibit competitors from the relevant market, and that this was plainly foreseeable by the defendants, then you may infer that defendants specifically intended to acquire, that they intended

to acquire monopoly power.

If you find that defendants had specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you must also determine if the evidence showed that there was a dangerous probability that defendants would sooner or later succeed in achieving its intended monopoly. In determining whether there was a dangerous probability of success, you should consider the following factors:

One, the defendants' market share and power

61

as compared to its competitors.

Second, the size and number of competitors in the market and the market share of each;

Third, whether defendants' share of the relevant market was increasing or decreasing.

Fourth, the actual or probable impact on competition of the defendants' restrictive or exclusionary acts or practices.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real; that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

The next claim is conspiracy to monopolize the market and I will tell you that again, that the term monopolize as used in the federal antitrust law means the power either to obtain or maintain the power to exclude competitors from a field of competition in a particular business or industry.

In this case, the plaintiff has alleged that the defendants have conspired to monopolize within the meaning of the antitrust laws, if it appears from a preponderance of the evidence in this

25 case:

62

1 First: That they have knowingly combined
2 or conspired either to obtain or to maintain the
3 power either to remove or to exclude or keep out
4 competitors from the field of competition.
5 Secondly, this must be proven by the
6 plaintiff, by a preponderance of the evidence.
7 Also, that they possessed the necessary
8 power to create a probability that they will be
9 successful in accomplishing that goal.
10 Thirdly, that they have the intent to
11 exercise their power to remove or exclude.
12 I have already described the law regarding
13 conspiracy, market power and intent. Of course, if
14 the power to remove or exclude competitors have been
15 exercised, and as a result of the exercise of such
16 power, one or more competitors has been removed or
17 excluded and some actual monopolization has already
18 occurred, but it is not necessary that competitors
19 actually be removed or excluded from the field of
20 competition before a combination or conspiracy can
21 be found to have monopolized.
22 Monopolization may be found to exist
23 whenever it appears from a preponderance of the
24 evidence in the case, that the three essential
25 elements or conditions I have just stated have in

63

1 fact occurred.
2 Members of the jury, if you find that the
3 plaintiff has proven all the elements of the
4 antitrust violation under Section 1 or 2 of the
5 Sherman Act, then you must determine whether the
6 plaintiff has suffered any injury by reason of these
7 violations.

This is the last element under each of these claims, both Section 1 and Section 2, claims brought by the plaintiff.

Standing alone the fact that the defendant engaged in anticompetitive conduct and the fact that plaintiff's business suffered is not sufficient to show injury. Plaintiff must show that his business suffered because of the anticompetitive conduct constituting monopolization or an attempt to monopolize or because of the unreasonable restraint of trade.

There may, of course, be a number of causes for a particular injury. Defendants contend that any injury plaintiff may have suffered was not caused by its activity but rather due to other reasons. Plaintiff does not have to prove that the unlawful activities were the sole cause of its injury.

64

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to his business or property caused by the violation.

In order for plaintiff to establish that he is entitled to recover damages, he must prove that he was injured as a result of the defendant's violation of the antitrust law. Proving causation does not require plaintiff to prove the dollar value of his injury. It requires only that the plaintiff prove that he was in fact injured by the defendant's antitrust violation. If you find that the plaintiff has established that he was in fact injured, you may then consider the amount of plaintiff's damages.

The plaintiff alleges that he had been foreclosed from competing in the adult open heart surgery market in Lehigh Valley. If you find that

the foreclosure of the plaintiff from competing in this market is a material cause of some damage flowing to plaintiff, then you must find the plaintiff has proven that he is entitled to recover damages from the defendant. The defendant's anti-trust violation need not be the sole cause of the plaintiff's injury. It is enough that the illegality is shown to be material cause of the

65

injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.

I further instruct you, members of the jury, that the plaintiff must establish that the injury he claims to have suffered was an injury to business or property. The term business includes any commercial interest, venture or enterprise. The term property includes anything of value. The plaintiff is injured in his property if anything of value has been damaged as a result of the defendant's alleged antitrust violation.

Plaintiff is also injured in his property if he lost money as a result of the defendant's alleged antitrust violation.

If you find that the plaintiff has lost money as a result of the defendant's exclusionary conduct, you must find the plaintiff has suffered an injury to business or property.

Members of the jury, only if you find the plaintiff has proven by a preponderance of the credible evidence that the defendants are liable on the plaintiff's claim, then you must determine damages that the plaintiff is entitled.

However, you should not infer that the

66

plaintiff is entitled to recover damages merely because I am providing you with an instruction on damages. It is exclusively your function to decide upon liability and I am instructing you on damages only so that you will have guidance, should you decide the plaintiff is entitled to recover. Damages are not to be presumed. The plaintiff must prove them by a preponderance of the evidence.

If you find that the plaintiff has been injured by the antitrust violation committed by the defendants, the law provides that the plaintiff should be fairly compensated for all damages to his business and property resulting from an antitrust violation.

The vagaries of the marketplace usually deny sure knowledge of what the plaintiff's position would be absent the antitrust violation. Therefore, an antitrust plaintiff is allowed considerable latitude in proving the amount of damages resulting from an antitrust violation. Accordingly, a plaintiff may rely on estimations and assumptions concerning what would have happened in the absence of the unlawful conduct and the defendant rather than the plaintiff bears the risk of the resulting uncertainty.

67

A jury may estimate the amount of damages as a matter of just and reasonable inference from the tendency of the antitrust violation to injure plaintiff in his business or product, coupled with evidence that the plaintiff's losses are not solely attributable to other causes.

There are no mechanical tests or formulae that dictate the proper methods of proving damages. However, plaintiff is entitled to recover any

profits he lost as a result of an antitrust violation caused by the defendant. Lost profits also include future lost profits. The only requirement is that the method chosen be reasonable. A damage theory may be based on assumptions, so long as the assumptions are reasonable in light of the record evidence. The reasonableness of the assumption underlying the defendant's claim. The plaintiff's damage theory ordinarily is determined by the trier of fact.

In calculating the plaintiff's damages, you should include as damages any lost income that tended to be caused by the antitrust violation. You should consider whether the plaintiff is entitled to money damages in an amount equal amount to the net revenues he lost as a result of the defendant's

68

violation of the antitrust laws.

As a matter of federal law, ladies and gentlemen, and applicable to the plaintiff's antitrust claim, the plaintiff is required to establish the present value of his claimed damages that is related to just the antitrust claims, the Section 1 and Section 2 claim. I'm about to go into breach of contract claims and they have a different damage standard.

If you award plaintiff any damages for his alleged antitrust injury, you may only award plaintiff the present value of such damages.

Now, ladies and gentlemen, if you would note on your verdict slip going to -- I just finished question number four, for you and also question number two, by going over the damage aspects, but moving on now to question number five.

Question number five reads as follows: Has the plaintiff proved by a preponderance of the

evidence that the defendant Lehigh Valley Hospital breached a contract with Dr. Angelico by not following its bylaws?

I tell you first and foremost, obviously you are supposed to answer yes or no. You are supposed to indicate the box. That the bylaws will

69

be included in the exhibits that will go out with you and rather than me highlighting any particular portions of the bylaws, they will be sent out. You will have the opportunity to read what portions of the bylaws, if any that you want to read pursuant to the testimony and evidence that you have been presented here in this case. All right.

And then, the sixth question reads: If your answer to question number five is yes, state the amount of damages proved by the plaintiff. And I'll go over this section, this claim by the plaintiff.

Again, note this claim is only against Lehigh Valley in question number five.

Question number seven: Has the plaintiff proven by a preponderance of the evidence that the defendant, St. Luke's breached its contract with Dr. Angelico by not allowing Dr. Angelico to reapply for his privileges in accordance with its bylaws?

So, again, this is another claim by the plaintiff, for breach of a different set of bylaws. These bylaws are with St. Luke's Hospital but the same principles apply for breach of contract in both of these claims. So, I will now instruct you on that law.

70

A breach occurs when a party to the contract fails to perform a duty imposed on it by a contract. It is your job as the jury to decide if there was a breach of the contract, that is whether one party failed to perform when it had a duty to do so.

Failure of a party to a contract to perform in accordance with its terms gives the other party a cause of action for breach. The breach of contract occurs when a party to a contract fails to perform any contractual duty of immediate performance or violates an obligation, engagement or duty.

To prevail on its claim for breach of contract, that is in reference to each of these claims that the plaintiff has brought, marked as number five and number seven on the verdict slip, plaintiff must show first the existence of a contract.

Second, the essential terms of the contract.

Third, a breach of the duty imposed by the contract.

And, fourth, that damages resulted from the breach.

You must not only determine if there was a

71

breach but you must also determine when considering all of the evidence in the case whether a breach was a material breach.

To decide if a breach is material, you should consider the benefit that the injured party lost as a result of the breach. The extent for which the breaching party will cure its breach, the extent for which the breaching party complied with the duty to act in compliance with the duty of good

faith and fair dealing.

Also you should consider the portion of the contract that the breaching party has failed to perform.

And, ladies and gentlemen, I further instruct you that not every nonperformance however is to be considered a breach of the contract. If you find that the nonperformance was trivial, thus that the contract was substantially performed, you must also find that a breach of contract has not occurred.

Members of the jury, you should note that a party cannot prevail in an action for nonperformance of a contract if he alone is responsible for the nonperformance. A party may not in fact take advantage of an insurmountable obstacle placed by

72

himself in the path of the other party's adherence to the agreement. By preventing performance, the party also excuses it.

When applying the facts of this case, in determining if there was in fact a breach, be mindful of the fact that where one party to a contract is the cause of another's failure to perform, it cannot assert that failure against the other.

If you find that the contract in this case has been breached, the injured party may sue on the contract, and recover damages or in some instance, specific performance. However, if you find that each of the parties committed a material breach, neither party may recover.

I further instruct you, members of the jury, that a party may waive or give up its contract rights. A party who sanctions or fails to protest

the breach of contract waives its right to recover for a breach of that contract. That party also cannot recover damages for nonperformance. A breach of contract may be waived either by implication or by express agreement. The party waiving a breach must know about the breach at the time of the waiver.

73

I further instruct you, members of the jury, that under the law in Pennsylvania, the medical staff bylaws constitute the term of a legal binding contract between the hospital, its staff and individuals applying for staff membership, pursuant to the bylaws.

Now, ladies and gentlemen, I'll instruct you on damages for breach of contract.

If you determine that there has been a breach of contract, again recall my instructions, the reason I am giving you instructions on this part is not to tell you that you must find damages, that's pursuant to your determination. I'm giving you these instructions so you will have all the information to make your determination pursuant to your deliberations.

If you determine that there has been a breach of contract, then you must determine what amount, if any, should be awarded to compensate for the breach. When a breach of contract occurs, the other party may recover for those injuries which have been proven to you with reasonable certainty to have resulted from the breach for the remaining term of the contract. Any compensation awarded for injury is termed damages. Generally, the measure of

74

damages is that sum which will compensate the

plaintiff for the loss sustained. If you find that the defendant breached the contract here, the defendants that are involved in this alleged breach by the plaintiff in question, number five is Lehigh Valley Hospital; question number seven is St. Luke's Hospital.

If you find that the defendant breached the contract, you must then decide, based on the evidence that the plaintiff has presented what amount of money will compensate plaintiff for those injuries which were a direct and foreseeable result of the breach, which the parties could have reasonably foreseen with certainty at the time they made the contract.

Specific evidence must be introduced to permit a reasonable certain estimate of the amount lost due to the breach.

When considering an award of compensatory damages, if you decide to award them, you must be guided by dispassionate common sense. Computing damages may be difficult but you must not let that difficulty lead you to engage in arbitrary guesswork. Compensation for a breach of contract will not be justly refused because proof of exact

amount of loss is not produced, for there is judicial recognition of the difficulty or even impossibility of the production of such proof.

In all instances, members of the jury, you are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence. You should recall that when you are awarding compensatory damages under the contract between the parties, you are to award only those damages for the period of time that the contract

would have been in effect, absent a breach.
Next, ladies and gentlemen, I will instruct you on the last portion of the verdict slip and that goes to question number nine. And that is: Has the plaintiff proved by a preponderance of the evidence, you recall that is the standard throughout the civil trial, and throughout each of these claims, that the plaintiff has brought, that the defendant, St. Luke's intentionally interfered with the plaintiff's existing or prospective business relationship at any other hospital? Yes, with a blank box next to it and no, with a blank box next to it. You are to mark the appropriate box pursuant to your deliberation.
Then, question number 10 has the question

76

dealing with damages. It says? If your answer to question number nine is yes, state the amount of damages proved by the plaintiff. There's a dollar sign, if you answer, and there's a line for the foreperson to sign an a line for the date to be entered and that is to be signed and dated not matter what your verdict is.
All right, ladies and gentlemen.
Moving on to intentional interference with business relationships.
Members of the jury, the plaintiff claims that St. Luke's Hospital tortiously interfered with the plaintiff's existing or prospective contractual relationship with patients of Dr. Angelico's services in referring physicians. To prove this claim the plaintiff must prove the following elements:
1. An existing or prospective contractual relation.
2. The purpose or intent to harm the plaintiff by terminating the contractual relation or

preventing it from occurring.
3. The absence of privilege or justification on the part of the defendant.
4. The occurrence of actual damages

77

resulting from the defendant's actions.
And 5. For prospective contracts, a reasonable likelihood that the relationship would have occurred but for the interference of the defendant.
I will now explain each of these elements in turn.
To prove an existing or prospective contractual relation, the plaintiff must prove the existence of a contractual relationship or a reasonable likelihood that plaintiff would have had a contract with another party, but for the defendants interference.
Here the defendant that's being alleged is St. Luke's Hospital.
Plaintiff alleges that he had both an existing and prospective contractual relationship with patients and referring physicians that would have continued beyond June of 1996, but for the defendant's actions. The defendant denies this allegation.
To prove the second element, namely that the purpose or the intent to harm the plaintiff by terminating the contractual relationship or preventing it from occurring, the plaintiff must

78

show that the defendant intended to infer with the plaintiff's contractual relationship with present and future patients and referring physicians and ability to acquire surgical privileges elsewhere or

that the defendant knew that the termination or prevention of patient contacts and physician referrals was certain, was substantially certain to occur as a result of their actions. Ill will towards the person harmed is not an essential condition of liability. Nor is a specific intent to harm required.

The third element which plaintiff must prove is the absence of privilege or justification on the part of the defendant.

A defendant who interferes with the plaintiff's contractual relation is acting with privilege and justification if he is a competitor of the plaintiff, if he does not use wrongful means and if his action does not create or continue an unlawful restraint of trade.

It is wrongful -- strike that.

It is wrongful means to take business away from a competitor by using economic power in matters that are unrelated to the business in which the competitors compete. Thus taking away a

79

competitor's business by applying economic pressure in an area that is unrelated to the field in which the parties compete constitutes wrongful means. Wrongful means also includes any unlawful conduct in violation of specific statutory provisions or of established public policy. To determine whether a defendant's interference was wrongful, you should consider the following factors: First, the nature of the actor's conduct. Second the actor's motive, the interest of the others with which the actor's conduct interferes. The interest sought to be advanced by the actor. The social interest in protecting the freedom of action of the actor. The contractual interest of others. The propensity or

remoteness -- strike that. The proximity or remoteness of the actor's conduct to the interference. And, further, the relations between the parties.

Members of the jury, if you find that the defendants have violated the tortious interference laws, you must then consider whether plaintiff's injury was proximately caused by the plaintiffs wrongful conduct.

An injury or damage is proximately caused by an act whenever it appears from the evidence in

80

the case that the act played a substantial part in bringing about or actually causing the injury or damage.

Thus, you must consider, based on the evidence presented in this case whether the defendant's wrongful actions were a substantial factor in causing plaintiff to lose his patient base, referral base and inability to obtain surgical privileges at any other hospital. If you so find, you must consider the amount of damages to be awarded to plaintiff.

I instruct you on damages as it relates to this particular claim of the plaintiff.

If you should find from a preponderance of the evidence, in this case, that the plaintiff has shown that the defendant tortiously interfered with the plaintiff's contractual relation, then the law provides the plaintiff is to be fairly compensated for all damages which were proximately caused by the defendant's conduct.

If the precise amount of plaintiff's damages is difficult to ascertain, that should not affect plaintiff's recovery, particularly if the defendant's actions have caused the difficulty in

25 determining the precise amount. On the other hand

81

1 the plaintiff is not to be awarded purely
2 speculative damages. Damages my be awarded only
3 when there is a reasonable basis in the evidence, in
4 the case for determining that the plaintiff has in
5 fact suffered a loss, even though the amount of such
6 loss is difficult to ascertain.
7 The plaintiff is entitled to be fairly and
8 adequately compensated for, first, the pecuniary
9 loss of the benefits of the contractual relationship
10 suffered by the plaintiff; and all other pecuniary
11 losses suffered by the plaintiff as a result of the
12 defendant's acts. If you find that compensatory
13 damages should be awarded, arising from tortious
14 interference with prospective contractual relations,
15 but compensatory damages are being awarded, the
16 breach of that contract against another defendant,
17 any damages awarded on the breach of contract claim
18 reduces the amount of damages awarded under tortious
19 interference with the contractual relation claim in
20 connection with that contract.
21 In other words, if you award damages
22 against St. Luke's for interfering with the
23 prospective contract between the defendant, Lehigh
24 Valley Hospital and plaintiff, the amount of the
25 award for tortious interference must be reduced by

82

1 the amount awarded against Lehigh Valley Hospital
2 for breach of contract between Lehigh Valley
3 Hospital and the plaintiff.
4 Ladies and gentlemen, as you can see from
5 my discussion with you on damages as relates to

breach of contract, and interference with contract damages, these damages are different from the damages dealing with the antitrust damages.

And, there is no present value requirement for these damages under state law.

And, before I leave the issue of damages, one of the last things I do before I talk to counsel for a moment, it deals with mitigation.

Members of the jury, it is the duty of any person who has been injured to use reasonable diligence and reasonable means under the circumstances, in order to prevent the aggravation of such injury and to affect a recovery from such injuries.

Plaintiff is required to use only those measures that are reasonably practicable under the circumstances. You may find he failed to mitigate his damages, if you find that he did not take an interim job or even a permanent job which might pay less or have fewer responsibilities. As time wears

on, you may find that it was inappropriate for plaintiff not to lower his sight and take employment in order to limit any damages. You must look at the facts of this particular case to determine if plaintiff should have taken alternative, if not substantial equivalent employment.

Defendants have the burden of proof on this issue. Defendants must prove by a preponderance of the evidence that plaintiff acted unreasonably in failing to take specific steps to minimize or limit his losses.

Ladies and gentlemen, when you go back into the jury room, you will consider each of the questions on the verdict slip. And, pursuant to your answers, you are to answer the next question,

like I said, there are three claims under Section 1 brought by the plaintiff against, well, there are two claims. It has been a long day.

There are two claims under Section 1. The first claim is against Lehigh Valley Hospital, St. Luke's Hospital and Easton. You are to answer according to your deliberations. And, the second claim is by illegal exclusive dealing arrangement is against Lehigh Valley Hospital and Easton Hospital.

And, you are to mark pursuant to your

84

deliberations, and going on to question number two, you are to indicate the damages pursuant to your determination on question one, subsection A, subsection B.

Obviously, if you answer that neither of these defendants are in violation of the Sherman Antitrust Act, there's no need to deal with question number two.

Moving on. I have gone through question number three with you. Likewise the difference in the individual claims brought by the plaintiff against those defendants named in each of the subsections of question number three.

Also question number four breaks down the damages under each subsection and pursuant to your deliberations, you are to mark the appropriate determination and damages that you find, if any. Again five deals with the breach of contract. Six deals with the damages pursuant thereto. Seven deals with breach of contract. Eight deals with damages pursuant thereto. Nine deals with intentional interference with the prospective business relationship. One deals with damages and a line for the foreperson and a date to be entered.

Now may I see counsel at sidebar briefly.

85

(Discussion at sidebar on the record as follows:)

THE COURT: Is everyone speaking?

MR. SIEDZIKOWSKI: I'll speak.

MR. MENGEL: One for each party?

THE COURT: Yes.

On behalf of the plaintiff is there any request for additional charge that I didn't cover?

MR. SIEDZIKOWSKI: Yes, your Honor.

THE COURT: Keep your voice down.

MR. SIEDZIKOWSKI: When you were talking about balancing the scales, you said balance the scales between plaintiff and defendants, plural. I would like to make clear the jury has to do it separately.

THE COURT: Yes, for sure, for each claim. That's not a problem.

MR. SIEDZIKOWSKI: Yes, your Honor. Thank you.

THE COURT: Any objections you have, you can put them on of the record after I send out the jury.

MR. MACK: When your Honor instructed the jury on the relevant market, your Honor said restraint of trade maybe judged in the framework of

86

relevant markets. Defining a relevant market may be useful.

The ABA model instruction says the plaintiff must prove what a relevant market is and if you find no relevant market has been proved by a preponderance of the evidence, you must find for the

defendant.
THE COURT: I stated that in my charge. I think I adequately covered that. I'll repeat it if you want me.
MR. MACK: I would like you to because of the use of the word may.
The second thing, your Honor, in this charge, it was not objected to, we have requested a charge on the weighing of the harm to competition with the beneficial effects under the rule of reason. This charge was not objected to.
THE COURT: That's right.
MR. MACK: Then the third thing, your Honor, just conscious parallelism, I don't think it was - - as to the second element that the defendants were conscious of each others conduct, this awareness was an element in their decision. I don't think that was mentioned, that obviously is an element of conscious parallelism.

87

THE COURT: I thought I read it.
MR. SIEDZIKOWSKI: I thought so too. I have no objection. I have no objection to the language.
THE COURT: Go ahead.
MR. STEVENS: You defined what monopoly could be but you didn't define what monopoly couldn't be. As to Lehigh Valley, I think you should tell them if they find Lehigh Valley is 50 percent or less, then that's not a monopoly.
THE COURT: Very well.
Any objection?
MR. STEVENS: If your Honor, not - - as far as just monopoly, not attempt to monopolize, but just the monopoly.
THE COURT: All right. Very well.

What else, anything else?
Quickly.
MR. STEVENS: Yes, your Honor.
THE COURT: I'll let you have an opportunity.
MR. STEVENS: On the breach of contract issue, the only damages there would be if they found we didn't do something right on the dues, that he would have had courtesy privileges and could do 12

88

percent, there's no other damages under the breach of - -
THE COURT: You can argue that. I gave the instructions on damages. Your objection is noted and overruled.
MR. MENGEL: Your Honor, I did not hear you - - you said, if you find a refusal to deal, joint refusal to deal, to exclude plaintiff, you should find for the plaintiff. I did not hear you say that in order to make such a finding, it is required that they find harm to competition.
THE COURT: It is included in the charge that I gave.
MR. MENGEL: The other two points would be objections to things you said.
THE COURT: You can take those after.
MR. MACK: When your Honor was instructing the jury, it described both the geographic market as the Lehigh Valley area and also the product market as adult cardiac surgery services. There is obviously a dispute in this case as to whether that is a geographic area or product market. I would request the Court address that.
THE COURT: It is their determination.
MR. MACK: Yes.

89

(Open Court)

THE COURT: Ladies and gentlemen, now that is the opportunity I consult with counsel to see if there are any additional points that they wish I instruct you. There are a few additional ones.

Starting off, initially when I instructed you as to the preponderance of the evidence and the scales tipping ever so slightly or the slightest degree in favor of the plaintiff. I may have said defendants on the other side.

It is as to each individual defendant. The plaintiff's evidence against each individual defendant, on each of these individual claims that the plaintiff has brought against each individual defendant.

When considering, you consider whether or not the plaintiff has proved by a preponderance of the evidence each of the essential elements of its claim as against each individual defendant.

Is that understood?

Also, as has been pointed out to me in talking about monopoly power, I indicated to you that if it was 80 percent or more, that it was somewhat, I forget the language, it may have been conclusive, 50 percent may have been an inference,

90

but if it is less than 50 percent, it is not a monopoly, all right.

I thought one could assume that from the instructions, but if not, I'm telling you that now. If the market share, the monopoly power is less than 50 percent, then it cannot be a monopoly.

That's only as to the monopoly claim, the one monopoly claim that has been brought by the

plaintiff against defendant Lehigh Valley Hospital as it applies to that particular charge.

I have been further requested to instruct you, members of the jury, that if you find that a plaintiff has proved a relevant market and that the defendants restraint has a substantial harmful effect on competition in that market, you must also weigh the effects of the restraint that is helpful to competition against any harmful effect. For instance you should consider whether the defendant hospital staffing policy promoted quality of care and the efficiency by assisting in the achievement of minimal volumes or assisted the hospital to maintain one uniform set of performance standards and protocol. All of these may be aspects of the restraint that benefit competition. If the beneficial effects outweigh the harmful effects or

91

the net effect on competition. Harmful is harmful but if not substantial, the restraint is not unreasonable or unlawful. The fact that a restraint does not provide any benefit to competition does not necessarily mean it is unreasonable. However, if the restraint has only a slight or insubstantial adverse impact on competition, it is not unreasonable or unlawful, even if it does not benefit competition.

I further instruct you, members of the jury, that pursuant to the--

Let me see. In reference to the conspiracy, and the concepts of conscious parallelism, I instruct you members of the jury, to establish a conspiracy based on conscious parallel behavior, a plaintiff must show first that the defendants' behavior was parallel. And, second, that the defendants were conscious of each other's

conduct, and that this awareness was an element in their decision-making processes. And, three, certain plus factors. I believe I covered that initially before.

And, further, I instruct you as it relates to relevant markets, recall my instructions to you, dealing with relevant market. The first thing

92

plaintiff must prove is what relevant market defendant's business is in. And if you find that no relevant market has been proven by the preponderance of the evidence, you must in fact find in favor of the defendant.

And, one last thing before I give you my concluding remarks which are very short, is that there is obviously a difference between the parties as to what is the market, what is the geographic market.

If I used in my description to you the surgical area of the Lehigh Valley, it is your responsibility and duty, ladies and gentlemen to determine what the geographic market is, based on the evidence that you have had, to be sufficient to prove or disprove what the relevant market was.

Is that understood, or geographic market was, is that understood?

So saying, ladies and gentlemen, I have now outlined to you the rules of law applicable to this case, the need for you to weigh the evidence and determine the facts.

Upon the conclusion of my instructions, you will decide to consider your verdict. You must determine the facts from all the testimony that you

93

have heard and the other evidence which has been received during the trial.

You are the sole and exclusive judges of the facts. In that area, neither I nor anyone else may infringe upon your responsibility. On the other hand and with equal emphasis, I instruct you that you must accept the rules of law as I have given them to you and apply that law to the facts you have found.

The attitude and the conduct of the jurors at the outset of their deliberations are matters of importance. Upon retiring to the jury room, your deliberations should begin and proceed in an ordinarily fashion.

Your first order of business in the jury room will be to select one of your members to be the foreperson to preside over your deliberations.

If in the course of your deliberations you should find yourself in serious doubt concerning some portion of my instructions to you on the law, it is your privilege to return to the courtroom for further instruction.

In such event, you should transmit a note to me, through my deputy clerk or the court reporter, signed by your foreperson. No juror

94

should attempt to communicate with the Court by any means other than a signed writing and the Court will not communicate with any juror on any subject touching the merits of the case otherwise than in writing or orally here in open court.

You should not at any time reveal even to the Court how the jury stands numerically until you have reached a verdict.

Your function, members of the jury, to

reach a fair conclusion from the evidence and applicable law is an important one.

Your verdict should be *reached only after* careful and thorough deliberation, in the course of which you should consult with each other and discuss the evidence and reasonable inferences to be drawn therefrom freely and fairly, in a sincere test to arrive at a just verdict.

It is your duty to consider the issues with a view toward reaching an agreement on a verdict, if you can do so without violating your individual judgment and your conscience.

You must each decide the case for yourself, examining the issues and the evidence with candor and frankness and with proper deference to and regard for the opinions of each other.

95

Mature consideration requires that you be willing to reexamine your own views and to change your opinion if convinced that it lacks merit or validity.

While maintaining this flexibility, you are not required to surrender your honest conviction as to the weight or the effect of evidence solely because of another juror's opinion, or for the mere purpose of returning a verdict.

Members of the jury, your verdict must represent the jury's considered final judgment. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

Keep in mind, members of the jury, that the dispute between the parties is for them a most serious matter. They and the Court rely upon you to give full and conscientious deliberation and consideration to the issues in evidence before you.

You should not allow sympathy or prejudice

to influence your deliberation. You should not be influenced by anything other than the law and the evidence of the case.

All the parties stand equally before the Court and each is entitled to the same fair and impartial treatment at your hands.

96

So saying, ladies and gentlemen, you are directed to go back into the jury room, all 11 of you, to begin your deliberations. And I'm going to ask you, at the outset, to let us know what time you want to deliberate to, that's your call. If you feel you want to deliberate a little later this evening, let us know. If you want to leave at the regular time that you were leaving at, let us know.

But, just when you go back to begin your deliberations, let us know and we will go from there.

All right, now you can talk about the case among yourselves.

You are excused, ladies and gentlemen.

(Jury retires to deliberate at 3:10 p.m.)

THE COURT: While I have you and things are still fresh in my mind, put your exceptions or objections on the record now. Take your time.

We will start off with the plaintiff, don't get in line, don't rush. I know that there's a number and everyone be seated.

Plaintiff.

MR. SIEDZIKOWSKI: Your Honor, we don't have any other objections, I preserved them yesterday and I don't have any new objections.

97

THE COURT: As I told you yesterday, your objections on anything that I ruled against you on

the points for charge is a continuing objection, live on and on in the life of this case.

All right. Mr. Stevens.

MR. STEVENS: No further objections, your Honor.

THE COURT: Very good.

Yes, sir counsel, come on forward, if you want to. Yes, from there you can, by all means.

I should charge for the length of the charge in this case.

MR. MENGEL: As long as you don't charge me.

There's two points I wanted to make, your Honor. First is that I understood you to instruct the jury, that if they find an agreement not to deal, that you instructed them that it was unreasonable as a matter of law.

THE COURT: No, that's not correct. I never said that.

MR. MENGEL: You didn't say that, if so, I misheard you.

THE COURT: You can check the transcript for that, if you feel that I did, you can raise -- you are putting that objection on the record, if I

did?

MR. MENGEL: If you did then my objection is noted.

THE COURT: All right.

MR. MENGEL: The second point that I have is that your Honor on the tortious interference claim against St. Luke's, referred to prospective contracts with patients and referring physicians. I didn't understand that was the claim. I understood the claim was simply restricted as does the verdict slip say to the prospective contracts with the other hospitals.

THE COURT: I read that verbatim from the plaintiff's points for charge, that was not objected to. All right, your objection is noted. We will see what happens with this. I understand.

MR. MACK: Just for the record, your Honor, we would object to the Court's instruction on market power to the extent that it differs from the standard instruction in the ABA manual, for the record.

THE COURT: Very good.

Now, counsel, here is what I'll do, I'll be getting ready to take a break from talking. I'm going to let you decide among yourselves initially,

99

what exhibits you want to go out with the jury. If you can agree to those first, working together as a unit. Those that you disagree, I'll come back out here and rule upon. All right.

If you want to take a couple of minutes, you can. I think they will let Miss Mickie know and she will let me know what time they want to go to. We will see whether or not what exhibits or anything they want.

Anything else before I take a break?

MR. SIEDZIKOWSKI: We can take a men's room break as well?

THE COURT: Sure, I wouldn't preclude you from going to the rest room, counsel.

(Recess.)

100

SIDNEY ROTHSCHILD, being a United States Court Reporter, United States District Court, Eastern District of Pennsylvania, do hereby certify that I was authorized to and did report in shorthand, the above and foregoing proceedings, and

that thereafter my shorthand notes were transcribed under my supervision, and that the foregoing pages contain a true and correct transcription of my shorthand notes taken therein.

Done and signed this 15th day of March 2001, in the City of Philadelphia, County of Philadelphia, State of Pennsylvania.

SIDNEY S. ROTHSCHILD

U.S. Court Reporters
United States District Court
Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD J. ANGELICO, M.D.
V. CIVIL ACTION
LEHIGH VALLEY HOSPITAL;
ST. LUKE'S HOSPITAL OF BETHLEHEM; EASTON HOSPITAL 96-2861

VERDICT SLIP

1. Has the plaintiff proved by a preponderance of the evidence that one or more of the defendants engaged in a combination, contract or conspiracy to restrain trade, in Violation of Section 1 of the Sherman Act, by:

a) by a concerted refusal to deal with Dr. Angelico?

	YES	NO
Lehigh Valley Hospital	____	_x__
St. Luke's Hospital	____	_x__
Easton Hospital	____	_x__

OR

b) by an illegal exclusive dealing arrangement?

2. If you answered "YES" to any of the questions above, #1(a) and/or (b) for any Defendant, state the amount that you find Plaintiff was injured in his business or property.

1(a): $ _____

1(b): $ _____

3. Has the Plaintif proved beyond a preponderance of the evidence that one or more Defendants, in violation of Section 2 of the Sherman Act:

a) monopolozed the market for cardiothoracic surgery in the Lehigh Valley?

Lehigh Valley Hospital	YES	NO
	____	_x__

OR

b) attempted to monopolize market for cardiothoracic surgery in the Lehigh Valley?

OR

c) conspired to monopolize market for cardiothoracic surgery in the Lehigh Valley?

	YES	NO
Lehigh Valley Hospital	____	_x__
St. Luke's Hospital	____	_x__
Easton Hospital	____	_x__

4. If your answer to Question # 3(a) through 3(c) is "Yes" for any Defendant, state the amount that the Plaintiff was injured in his business.

3(a) _____
3(b) _____
3(c) _____

5. Has the plaintiff proved by a preponderance of the evidence that the defendant Lehigh Valley Hospital breached a contract with Dr. Angelico by not following its bylaws?

YES [ ] NO [x]

6. If your answer to Question # 5 is "Yes", state the amount of damages proved by Plaintiff.

7. Has the plaintiff proven by a preponderance of the evidence that the defendant, St. Luke's breached its contract with Dr. Angelico by not allowing Dr. Angelico to reapply for his privileges in accordance with its bylaws?

YES [ ] NO [x]

8. If your answer to Question # 7 is "Yes", state the amount of damages proved by Plaintiff. $_____

9. Has the plaintiff proved by a preponderance of the evidence that the defendant, St. Luke's intentionally interfered with the plaintiff' existing or prospective business relationship at any other hospital?

YES [ ] NO [x]

10. If your answer to Question # 7 is "Yes", state the amount of damages proved by Plaintiff. $_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Richard J.Angelico, M.D. Civil Action
v. No. 9628
Lehigh Valley Hospital, et al Filed MAR 16 2001

CIVIL JUDGMENT

Before the Honorable J. Curtis Joyner

AND NOW, this 16th day of MARCH, 2001 in accordance with the verdict rendered,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Defendants - Lehigh Valley Hospital; St.Luke's Hospital of Bethiehem; Easton Hosptia1 and against Plaintiff - Richard J. Angelico, MD.

BY THE COURT

ATTEST:
"/s/ Angela Mickie"
Angela Mickie
Deputy Clerk
Civ 1 (8/80)

ENTERED: 3-19-01
CLERK OF COURT

TRIAL TESTIMONY 2-9-01

15

THE COURT: Can I have this question read back and before you read it back, ladies and gentlemen, the reason that I am having these questions read back is because I am not listening to them, because I am not the fact-finder. You are the fact-finder. I am up here reading some other cases and some other opinions that I have to produce, because I have to take advantage of this opportunity.

16

So, when I ask the court reporter to read it back, it's because I am not listening. That is your job, all right?

TRIAL TESTIMONY 3-13-01

(MR. STEVENS - COUNSEL FOR RESPONDENT)
(MR. SIEDZIKOWSKI and MR. RASSIAS – COUNSEL FOR PETITIONER)

249

Number five.
MR. STEVENS: We object to this one, Your Honor, because the only breach of contract theory against us is the bylaws. I mean the dues.
Now, that's the only thing that they pled

250

against us on the contract. They didn't plead -- not filing the bylaws and the handling of its privileges, the so-called Fair Hearing of the Data

Bank. That's not a contractual argument that they pled in their initial complaint.
THE COURT: Doesn't it go to the bylaws? Hasn't that been the whole of this whole discussion, is that there's been a breach of the bylaws by --
MR. SIEDZIKOWSKI: Your Honor --
MR. STEVENS: The only thing pled, Your Honor, in the case has been as to dues. That's the only thing in their complaint, Count five, which is the contract action, which only deals with dues. Nothing else.
MR. SIEDZIKOWSKI: We also pled that they did not give him adequate notice before the Fair Hearing. Those were bylaws provisions, and we had them in the complaint.
MR. STEVENS: Not in count five.
THE COURT: You can look in count five right now and see -- we'll make a determination if that goes. If not, I will conclude question number five at the end of the word bylaws.
MR. SIEDZIKOWSKI: Your Honor, I don't have my complaint handy. I incorporate all the

allegations in the complaint if I follow my typical --
MR. STEVENS: I can pass it up.
THE COURT: You're an officer of the Court. I trust you.
MR. STEVENS: 118 is fully set out here in 120. Paragraph 120, defendant Lehigh Valley's Medical staff bylaws serve as a contract between the hospital and its medical staff.

121, by not providing timely notice to plaintiff for the collection of medical staff dues, as required by the hospital bylaws, Lehigh Valley Hospital breached its contractual duty when it revoked Dr. Angelico's courtesy privileges. Paragraph 122. As a result of the improper revocation of his courtesy privileges, Dr. Angelico has suffered substantial pecuniary loss in excess of $50,000. Wherefore, plaintiff prays for judgment against defendant, and in favor of the plaintiff as follows.

And then it has three ways to recover the damages. A, that plaintiff recover his damages determined to have been sustained as a result of the defendant's conduct, together with interest and costs.

252

B, that plaintiff's improperly revoked courtesy privileges be reinstated, retroactive to the date of such improper revocation.

C, that plaintiff shall have such other and further relief as the Court may deem appropriate.

And then they go to count 6.

MR. SIEDZIKOWSKI: Your Honor, we incorporated the beginning parts of the complaint, which also set forth that he didn't get the adequate notice in terms of -- before the Fair Hearing. Now, the Data Bank entry admittedly wasn't in there because that had not yet occurred at the time of the complaint. But I would argue that the pleadings should conform to the evidence at this point. We know the Data Bank entry has been an

issue.
THE COURT: But you have put the defendants on notice that the breach of the bylaws was not based on anything other than the dues. You didn't say the bylaws was -- the contract was breached because of a notice requirement here. You didn't say that the contract was breached because of a failure of the data entry here. You said that the contract was breached based on the failure to pay dues. That's your words, that you took time and

253

energy to produce and file to put them on notice of the claim.
So where are they on notice of any other section of the bylaws that they breached?
MR. SIEDZIKOWSKI: Your Honor, I mean if I had the complaint, I could go back to paragraphs one through -- 118 and find the paragraphs where we talk about, we didn't let him cross-examine and we didn't give notice of the specific charges. We didn't pull all that back specifically to count five. We incorporated them all by reference.
THE COURT: You have allegations that take place in one through 18. But you tell them that they breached this contract not by those allegations that you proposed in one through 18, but by his failure to pay dues. You have the right to say you're in breach of your contract because you didn't give him a fair hearing. You're in breach of your contract because you didn't allow him to cross-examine witnesses on his behalf at the hearing.
You breached the contract by failure -- by

putting this in a data entry, but you didn't allege that. You alleged certain facts, but you alleged the breach of contract that puts them on notice from

254

the failure to pay dues.
MR. SIEDZIKOWSKI: That was a specific reference, Your Honor, in paragraph five. I respectfully submit to the Court they've been on notice as to what our claims are about the Data Bank entry and about the failure to permit cross-examination, and gave adequate notice right from the beginning of this case.
THE COURT: You say right from the beginning, but you just said that the Data Bank entry was not there. So you concede that at this point.
MR. SIEDZIKOWSKI: That was not in until after the case started, yes.
THE COURT: So you concede that. You haven't said yes or no.
MR. SIEDZIKOWSKI: I concede that was not in the complaint, Your Honor.
THE COURT: So the Data Bank entry is out.

TRIAL TESTIMONY 3-14-01

6

MR. RASSIAS: Your Honor, may I kindly have 30 seconds just to place something on the record?
THE COURT: Surely.

7

MR. RASSIAS: It goes to Your Honor's Data Bank rulings yesterday, and it was something that occurred to us last evening as we were putting Your Honor's ruling in context with regard to the breach of contract. I'd like to raise it now for the record. This is from the plaintiff's pretrial memorandum and it actually begins on page one. "Plaintiff also intends to introduce evidence in its case on the breach of contract count of non-compliance with its medical staff by-laws on the part of defendant Lehigh Valley Hospital, as they pertain to Dr. Angelico's Fair Hearing, and for tortious interference for reporting a false entry to the National Practitioner's Data Bank. Although the specific tortious interference count is not contained within the present complaint, and in fact has been served against LVH in a related state action, plaintiff seeks to conform the pleadings to the evidence he expects to present in this action. They are based on the same operative facts as the antitrust claims." I just respectfully submit that there has been no objection to that at any time during and throughout the course of this trial. And I thank the Court.

8

THE COURT: That is not a correct statement. There has been an objection made. Counsel made an objection to that yesterday.
MR. RASSIAS: Yes, sir, at the close of all the evidence. After the Data Bank issue had in fact

been presented, there was an objection at that time, after the six weeks of trial.
THE COURT: But don't they have a right to raise the objection at any point in time in the trial before this matter goes to the jury, when in fact plaintiff has never alleged that in their initial complaint, comes to the trial and sneaks it in in a trial memorandum, and in a trial that's going to take five to six weeks and the numerous documents and pages that are contained in the litigation that's before us?
You're telling the Court that because you included that statement in a trial memorandum, that the defendants are bound forever more with this claim of data entry? I'm just asking.
MR. RASSIAS: Yes, sir, I understand. I don't think that that's exactly what I said, but I think that the only thing I would offer to Your Honor to consider is the caliber and the nature of the objection. When a defendant is on notice and

rides this wave out for six weeks and hears expert testimony and does all those things, if there's a different type of objection, other than notice, which is the only objection that they lodged, that's my concern, and that's why I want the record to be crystal clear.
Had they objected on some other grounds as a matter of law, for whatever reason -- I can't think of them right now, but if there's any other substantive reason for the objection, then I think that Your Honor's point is very well taken, and I

probably wouldn't have asked to put this statement on the record.
However, the defendant's objection was, we didn't have notice of this. It wasn't in the complaint. That was borne out yesterday. All I want to make sure is that the record is very clear, that not only did they have notice from the pretrial memo -- it wasn't just a trial memo. This is the pretrial. This is what we're basing our witnesses and everything on --
THE COURT: Pretrial. That's long after discovery has ended and concluded.
MR. RASSIAS: That's true. But also if we want to talk about discovery, they did question the

10

plaintiff about all these types of things with the Data Bank.
THE COURT: It makes no difference. You did not allege to them -- I understand your position. You made your record. Any further comments from the defendant in that regard?

-CITE-

42 USC CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

-MISC1-

Sec.

11101. Findings.

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

11111. Professional review.

(a) In general.

(b) Exception.

(c) Treatment under State laws.

11112. Standards for professional review actions.

(a) In general.

(b) Adequate notice and hearing.

(c) Adequate procedures in investigations or health emergencies.

11113. Payment of reasonable attorneys' fees and costs in defen of suit.

11114. Guidelines of Secretary.

11115. Construction.

(a) In general.

(b) Scope of clinical privileges.

(c) Treatment of nurses and other practitioners.

(d) Treatment of patient malpractice claims.

SUBCHAPTER II - REPORTING OF INFORMATION

11131. Requiring reports on medical malpractice payments.

(a) In general.
(b) Information to be reported.
(c) Sanctions for failure to report.
(d) Report on treatment of small payments.
11132. Reporting of sanctions taken by Boards of Medical Examiners.
(a) In general.
(b) Failure to report.
11133. Reporting of certain professional review actions taken by health care entities
(a) Reporting by health care entities.
(b) Reporting by Board of Medical Examiners.
(c) Sanctions.
(d) References to Board of Medical Examiners.
11134. Form of reporting.
(a) Timing and form.
(b) To whom reported.
(c) Reporting to State licensing boards.
11135. Duty of hospitals to obtain information.
(a) In general.
(b) Failure to obtain information.
(c) Reliance on information provided.
11136. Disclosure and correction of information.
11137. Miscellaneous provisions.
(a) Providing licensing boards and other health care entities with access to information.
(b) Confidentiality of information.
(c) Relief from liability for reporting.
(d) Interpretation of information.
SUBCHAPTER III - DEFINITIONS AND REPORTS
11151. Definitions.
11152. Reports and memoranda of understanding.
(a) Annual reports to Congress.
(b) Memoranda of understanding.
(c) Memorandum of understanding with Drug Enforcement Administration.

-SECREF-
CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 1320a-7e, 1396r-2 of this title.

-CITE-
42 USC Sec. 11101

-EXPCITE-
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

-HEAD-
Sec. 11101. Findings

-STATUTE-
The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance

.

(3) This nationwide problem can be remedied through effective professional peer review

.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review

.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 402, Nov. 14, 1986, 100 Stat. 3784.)

-REFTEXT-

REFERENCES IN TEXT

The Federal antitrust laws, referred to in par. (4), are classified generally to chapter 1 (Sec. 1 et seq.) of Title 15, Commerce and Trade.

-MISC2-

SHORT TITLE

Section 401 of title IV of Pub. L. 99-660 provided that: "This title (enacting this chapter and provisions set out as a note under section 11111 of this title) may be cited as the 'Health Care Quality Improvement Act of 1986'."

-CITE-

42 USC SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-CITE-

42 USC Sec. 11111

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

Sec. 11111. Professional review

-STATUTE-

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section -

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of à physician shall be held, by reason of having provided such information, to be liable in

damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989

Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of, (FOOTNOTE 1) for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

(FOOTNOTE 1) So in original. Probably should be "for purposes of subparagraph (A),".

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 411, Nov. 14, 1986, 100 Stat. 3784;

Pub. L. 100-177, title IV, Sec. 402(c), as added Pub. L. 101-239,

title VI, Sec. 6103(e)(6)(A), Dec. 19, 1989, 103 Stat. 2208.)

-REFTEXT-

REFERENCES IN TEXT

The Civil Rights Act of 1964, referred to in subsec. (a)(1), is Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended, which is classified principally to subchapters II to IX (Sec. 2000a et seq.) of chapter 21 of this title. Title VII of this Act relates to equal employment opportunities, and is classified generally to subchapter VI (Sec. 2000e et seq.) of chapter 21 of this title.

For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Civil Rights Acts, referred to in subsec. (a)(1), are classified generally to chapter 21 (Sec. 1981 et seq.) of this title.

-MISC2-

AMENDMENTS

1989 - Subsec. (c)(2)(B), (C). Pub. L. 101-239 added Pub. L.100-177, Sec. 402(c), see 1987 Amendment note below.

1987 - Subsec. (c)(2)(B), (C). Pub. L. 100-177, Sec. 402(c), as added by Pub. L. 101-239, redesignated subpar. (C) as (B), struck out "subparagraphs (A) and (B)" after "for purposes of", and struck out former subpar. (B) which read as follows: "Subsection (a) of this section shall not apply to State laws in a State for actions commenced on or after October 14, 1989, if the State by legislation elects such treatment."

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-177 effective Nov. 14, 1986, see section 402(d) of Pub. L. 100-177, as renumbered and amended, set out as a note under section 11137 of this title.

EFFECTIVE DATE

Section 416 of Pub. L. 99-660 provided that: "This part (part A (Sec. 411-416) of title IV of Pub. L. 99-660, enacting thissubchapter) shall apply to professional review actions commenced on or after the date of the enactment of this Act (Nov. 14, 1986)."

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 11112, 11133 of this

title.

-CITE-

42 USC Sec. 11112

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

Sec. 11112. Standards for professional review actions

-STATUTE-

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken -

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating -

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating -

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B) -

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) -

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right -

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right -

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute

failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as -

(1) requiring the procedures referred to in subsection (a)(3) of this section -

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinica privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 412, Nov. 14, 1986, 100 Stat. 3785.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 11111, 11113, 11114 of this title.

-CITE-

42 USC Sec. 11113

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

Sec. 11113. Payment of reasonable attorneys' fees and costs in defense of suit

-STATUTE-

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 413, Nov. 14, 1986, 100 Stat. 3787.)

-CITE-

42 USC Sec. 11114

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

Sec. 11114. Guidelines of Secretary

-STATUTE-

The Secretary may establish, after notice and opportunity for comment, such voluntary guidelines as may assist the professional review bodies in meeting the standards described in section 11112(a) of this title.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 414, Nov. 14, 1986, 100 Stat. 3787.)

-CITE-

42 USC Sec. 11115

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER I - PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

-HEAD-

Sec. 11115. Construction

-STATUTE-

(a) In general

Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter.

(b) Scope of clinical privileges

Nothing in this subchapter shall be construed as requiring health care entities to provide clinical privileges to any or all classes or types of physicians or other licensed health care practitioners.

(c) Treatment of nurses and other practitioners

Nothing in this subchapter shall be construed as affecting, or modifying any provision of Federal or State law, with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health professionals who are not physicians.

(d) Treatment of patient malpractice claims

Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 415, Nov. 14, 1986, 100 Stat. 3787; Pub. L. 100-177, title IV, Sec. 402(c), as added Pub. L. 101-239, title VI, Sec. 6103(e)(6)(A), Dec. 19, 1989, 103 Stat. 2208.)

-MISC1-

AMENDMENTS

1989 - Subsec. (a). Pub. L. 101-239 added Pub. L. 100-177, Sec.402(c), see 1987 Amendment note below.

1987 - Subsec. (a). Pub. L. 100-177, Sec. 402(c), as added by Pub. L. 101-239, inserted before period at end "or as preempting or overriding any State law which provides incentives, immunities, or protection for those ngaged in a professional review action that is in addition to or greater than that provided by this subchapter".

EFFECTIVE DATE OF 1987 AMENDMENT

Amendment by Pub. L. 100-177 effective Nov. 14, 1986, see section 402(d) of Pub. L. 100-177, as renumbered and amended, set out as a note under section 11137 of this title.

-CITE-

42 USC SUBCHAPTER II - REPORTING OF INFORMATION

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

SUBCHAPTER II - REPORTING OF INFORMATION

-SECREF-

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 11152 of this title.

-CITE-

42 USC Sec. 11131

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11131. Requiring reports on medical malpractice payments

-STATUTE-

(a) In general

Each entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof.

(b) Information to be reported

The information to be reported under subsection (a) of this section includes -

(1) the name of any physician or licensed health care practitioner for whose benefit the payment is made,

(2) the amount of the payment,

(3) the name (if known) of any hospital with which the physician or practitioner is affiliated or associated,

(4) a description of the acts or omissions and injuries or illnesses upon which the action or claim was based, and

(5) such other information as the Secretary determines is required for appropriate interpretation of information reported under this section.

(c) Sanctions for failure to report

Any entity that fails to report information on a payment required to be reported under this section shall be subject to a civil money penalty of not more than $10,000 for each such payment involved.

Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(d) Report on treatment of small payments

The Secretary shall study and report to Congress, not later than two years after November 14, 1986, on whether information respecting small payments should continue to be required to be reported under subsection (a) of this section and whether information respecting all claims made concerning a medical malpractice action should be required to be reported under such subsection.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 421, Nov. 14, 1986, 100 Stat.3788.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 11134 of this title.

-CITE-

42 USC Sec. 11132

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11132. Reporting of sanctions taken by Boards of Medical Examiners

-

-STATUTE-

(a) In general

(1) Actions subject to reporting

Each Board of Medical Examiners -

(A) which revokes or suspends (or otherwise restricts) a physician's license or censures, reprimands, or places on probation a physician, for reasons relating to the physician's professional competence or professional conduct, or

(B) to which a physician's license is surrendered, shall report, in accordance with section 11134 of this title, the information described in paragraph (2).

(2) Information to be reported

The information to be reported under paragraph (1) is -

(A) the name of the physician involved,

(B) a description of the acts or omissions or other reasons (if known) for the revocation, suspension, or surrender of license, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Failure to report

If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (a) of this section, the Secretary shall designate another qualified entity for the reporting of information under section 11133 of this title.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 422, Nov. 14, 1986, 100 Stat. 3789.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1396r-2, 11133, 11134 of this title.

-CITE-

42 USC Sec. 11133

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11133. Reporting of certain professional review actions taken by health care entities

-STATUTE-

(a) Reporting by health care entities

(1) On physicians

Each health care entity which -

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician -

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society, shall report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3).

(2) Permissive reporting on other licensed health care practitioners

A health care entity may report to the Board of Medical Examiners, in accordance with section 11134(a) of this title, the information described in paragraph (3) in the case of a licensed health care practitioner who is not a physician, if the entity would be required to report such information under paragraph (1) with respect to the practitioner if the practitioner were a physician.

(3) Information to be reported

The information to be reported under this subsection is -

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) Reporting by Board of Medical Examiners

Each Board of Medical Examiners shall report, in accordance with section 11134 of this title, the information reported to it under subsection (a) of this section and known instances of a health care entity's failure to report information under subsection (a)(1) of this section.

(c) Sanctions

(1) Health care entities

A health care entity that fails substantially to meet the requirement of subsection (a)(1) of this section shall lose the protections of section 11111(a)(1) of this title if the Secretary publishes the name of the entity under section 11111(b) of this title.

(2) Board of Medical Examiners

If, after notice of noncompliance and providing an opportunity to correct noncompliance, the Secretary determines that a Board of Medical Examiners has failed to report information in accordance with subsection (b) of this section, the Secretary shall designate another qualified entity

for the reporting of information under subsection (b) of this section.

(d) References to Board of Medical Examiners

Any reference in this subchapter to a Board of Medical Examiners includes, in the case of a Board in a State that fails to meet the reporting requirements of section 11132(a) of this title or subsection (b) of this section, a reference to such other qualified entity as the Secretary designates.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 423, Nov. 14, 1986, 100 Stat. 3789.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 11111, 11132, 11134 of this title.

-CITE-

42 USC Sec. 11134

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11134. Form of reporting

-STATUTE-

(a) Timing and form

The information required to be reported under sections 11131,

11132(a), and 11133 of this title shall be reported regularly (but not less often than monthly) and in such form and manner as the Secretary prescribes. Such information shall

first be required to be reported on a date (not later than one year after November 14, 1986) specified by the Secretary.

(b) To whom reported

The information required to be reported under sections 11131, 11132(a), and 11133(b) of this title shall be reported to the Secretary, or, in the Secretary's discretion, to an appropriate private or public agency which has made suitable arrangements with the Secretary with respect to receipt, storage, protection of confidentiality, and dissemination of the information under this subchapter.

(c) Reporting to State licensing boards

(1) Malpractice payments

Information required to be reported under section 11131 of this title shall also be reported to the appropriate State licensing board (or boards) in the State in which the medical malpractice claim arose.

(2) Reporting to other licensing boards

Information required to be reported under section 11133(b) of this title shall also be reported to the appropriate State licensing board in the State in which the health care entity is located if it is not otherwise reported to such board under subsection (b) of this section.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 424, Nov. 14, 1986, 100 Stat. 3790.)

-SECREF-

SECTION REFERRED TO IN - OTHER SECTIONS

This section is referred to in sections 11131, 11132, 11133, 11135, 11136, 11137 of this title.

-CITE-

42 USC Sec. 11135

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11135. Duty of hospitals to obtain information

-STATUTE-

(a) In general

It is the duty of each hospital to request from the Secretary (or the agency designated under section 11134(b) of this title), on and after the date information is first required to be reported under section 11134(a) of this title) - (FOOTNOTE 1)

(FOOTNOTE 1) So in original. The closing parenthesis probably should not appear.

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this subchapter concerning the physician or practitioner, and

(2) once every 2 years information reported under this subchapter concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times.

(b) Failure to obtain information

With respect to a medical malpractice action, a hospital which does not request information respecting a physician or practitioner as required under subsection (a) of this section is presumed to have knowledge of any information reported under this subchapter to the Secretary with respect to the physician or practitioner.

(c) Reliance on information provided

Each hospital may rely upon information provided to the hospital under this chapter and shall not be held liable for such reliance in the absence of the hospital's knowledge that the information provided was false.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 425, Nov. 14, 1986, 100 Stat. 3790.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 11137 of this title.

-CITE-

42 USC Sec. 11136

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11136. Disclosure and correction of information

-STATUTE-

With respect to the information reported to the Secretary (or the agency designated under section 11134(b) of this title) under this subchapter respecting a physician or other licensed health care practitioner, the Secretary shall, by regulation, provide for -

(1) disclosure of the information, upon request, to the physician or practitioner, and

(2) procedures in the case of disputed accuracy of the information.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 426, Nov. 14, 1986, 100 Stat. 3791.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 11137 of this title.

-CITE-

42 USC Sec. 11137

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SUBCHAPTER II - REPORTING OF INFORMATION

-HEAD-

Sec. 11137. Miscellaneous provisions

-STATUTE-

(a) Providing licensing boards and other health care entities with access to information

The Secretary (or the agency designated under section 11134(b) of this title) shall, upon request, provide information reported under this subchapter with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

(b) Confidentiality of information

(1) In general

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure.

Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(2) Penalty for violations

Any person who violates paragraph (1) shall be subject to a civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1320a-7a of this title are imposed and collected under that section.

(3) Use of information

Subject to paragraph (1), information provided under section 11135 of this title and subsection (a) of this section is intended to be used solely with respect to activities in the furtherance of the quality of health care.

(4) Fees

The Secretary may establish or approve reasonable fees for the disclosure of information under this section or section 11136 of this title. The amount of such a fee may not exceed the costs of processing the requests for disclosure and of providing such information. Such fees shall be available to the Secretary (or, in the Secretary's discretion, to the agency designated under section 11134(b) of this title) to cover such costs.

(c) Relief from liability for reporting

No person or entity (including the agency designated under section 11134(b) of this title) shall be held liable in any civil action with respect to any report made under this subchapter (including information provided under subsection (a) of this section (FOOTNOTE 1) without knowledge of the falsity of the information contained in the report.

(FOOTNOTE 1) So in original. Probably should be followed by a closing parenthesis.

(d) Interpretation of information

In interpreting information reported under this subchapter, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 427, Nov. 14, 1986, 100 Stat. 3791; Pub. L. 100-177, title IV, Sec. 402(a), (b), Dec. 1, 1987, 101 Stat. 1007.)

-MISC1-

AMENDMENTS

1987 - Subsec. (b)(1). Pub. L. 100-177, Sec. 402(a)(1), substituted "as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary)" for "with respect to medical malpractice actions" and inserted at end "Information reported under this subchapter that is in a form that does not permit the identification of an particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 11134(b) of this title), on application by any person, shall prepare such information in such form and shall disclose such information in such form."

Subsec. (b)(4). Pub. L. 100-177, Sec. 402(b), added par. (4).

Subsec. (c). Pub. L. 100-177, Sec. 402(a)(2), inserted " (including the agency designated under section 11134(b) of this title)" after "entity" and " including information provided under subsection (a) of this section" after "subchapter".

EFFECTIVE DATE OF 1987 AMENDMENT

Section 402(d), formerly section 402(c), of Pub. L. 100-177, as renumbered and amended by Pub. L. 101-239, title VI, Sec 6103(e)(6), Dec. 19, 1989, 103 Stat. 2208, provided that: "(1) In general. - The amendments made by subsections

(a) and (c) (amending this section and sections 1111 and 1115 of this title) shall become effective on November 14, 1986.

" (2) Fees. - The amendment made by subsection (b) (amending this section) shall become effective on the date of enactment of this Act (Dec. 1, 1987)."

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1396r-2 of this title.

-CITE-

42 USC SUBCHAPTER III - DEFINITIONS AND REPORTS

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER III - DEFINITIONS AND REPORTS

.

-HEAD-

SUBCHAPTER III - DEFINITIONS AND REPORTS

-CITE-

42 USC Sec. 11151

-EXPCITE-

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER III - DEFINITIONS AND REPORTS

-HEAD-

Sec. 11151. Definitions

-STATUTE-

In this chapter:

(1) The term "adversely affecting" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

(2) The term "Board of Medical Examiners" includes a body comparable to such a Board (as determined by the State) with responsibility for the licensing of physicians and also includes a subdivision of such a Board or body.

(3) The term "clinical privileges" includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

(4)(A) The term "health care entity" means -

(i) a hospital that is licensed to provide health care services by the State in which it is located,

(ii) an entity (including a health maintenance organization or group medical practice) that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary), and

(iii) subject to subparagraph (B), a professional society (or committee thereof) of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care (as determined under regulations of the Secretary).

(B) The term "health care entity" does not include a professional society (or committee thereof) if, within the previous 5 years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

(5) The term "hospital" means an entity described in paragraphs (1) and (7) of section 1395x(e) of this title.

(6) The terms "licensed health care practitioner" and "practitioner" mean, with respect to a State, an individual (other than a physician) who is licensed or otherwise authorized by the State to provide health care services.

(7) The term "medical malpractice action or claim" means a written claim or demand for payment based on a

health care provider's furnishing (or failure to furnish) health care services, and includes the filing of a cause of action, based on the law of tort, brought in any court of any State or the United States seeking monetary damages.

(8) The term "physician" means a doctor of medicine or osteopathy or a doctor of dental surgery or medical dentistry legally authorized to practice medicine and surgery or dentistry by a State (or any individual who, without authority holds himself or herself out to be so authorized).

(9) The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on -

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or

professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

(10) The term "professional review activity" means an activity of a health care entity with respect to an individual physician -

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership.

(11) The term "professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

(12) The term "Secretary" means the Secretary of Health and Human Services.

(13) The term "State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

(14) The term "State licensing board" means, with respect to a physician or health care provider in a State, the agency of the State which is primarily responsible for the licensing of the physician or provider to furnish health care services.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 431, Nov. 14, 1986, 100 Stat.3792.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1396r-2, 11111 of this title.

-CITE-
42 USC Sec. 11152

-EXPCITE-
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 - ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES
SUBCHAPTER III - DEFINITIONS AND REPORTS
-HEAD-
Sec. 11152. Reports and memoranda of understanding

-STATUTE-
(a) Annual reports to Congress

The Secretary shall report to Congress, annually during the three years after November 14, 1986, on the implementation of this chapter.

(b) Memoranda of understanding

The Secretary of Health and Human Services shall seek to enter into memoranda of understanding with the Secretary of Defense and the Administrator of Veterans' Affairs to apply the provisions of subchapter II of this chapter to hospitals and other facilities and health care providers under the jurisdiction of the Secretary or Administrator, respectively. The Secretary shall report to Congress, not later than two years after November 14, 1986, on any such memoranda and on the cooperation among such officials in establishing such memoranda.

(c) Memorandum of understanding with Drug Enforcement Administration

The Secretary of Health and Human Services shall seek to enter into a memorandum of understanding with the Administrator of Drug Enforcement relating to providing for the reporting by the Administrator to the Secretary of information respecting physicians and other practitioners whose registration to dispense controlled substances has been suspended or revoked under section 824 of title 21. The Secretary shall report to Congress, not later than two years

after November 14, 1986, on any such memorandum and on the cooperation between the Secretary and the Administrator in establishing such a memorandum.

-SOURCE-

(Pub. L. 99-660, title IV, Sec. 432, Nov. 14, 1986, 100 Stat. 3794.)

CHANGE OF NAME

Reference to Administrator of Veterans' Affairs deemed to refer to Secretary of Veterans Affairs pursuant to section 10 of Pub. L.100-527, set out as a Department of Veterans Affairs Act note under section 301 of Title 38, Veterans' Benefits.

Respectfully Submitted,
Richard J. Angelico, MD
Petitioner, Pro Se
2021 Weyhill Drive
Center Valley, PA 18034
(610) 838-2287

Supreme Court, U.S.
FILED
JUN 28 2004
OFFICE OF THE CLERK

No. 03-1594

IN THE

Supreme Court of the United States

RICHARD J. ANGELICO, M.D.,

Petitioner,

v.

LEHIGH VALLEY HOSPITAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

RICHARD F. STEVENS
Counsel of Record
GLENN GUANOWSKY
Attorneys for Respondent
740 Hamilton Street
Allentown, PA 18101-2488
(610) 439-1451

188151

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner properly preserved his argument as to whether the Trial Court may withhold from jury consideration the factual basis for immunity under the Health Care Quality Improvement Act and thus appropriately present it for review by this Court?

2. Whether there is any conflict between the Courts of Appeal as to whether immunity under the Health Care Quality Improvement Act is an issue of law to be determined by the Court?

3. Whether the Trial Court was within its authority to grant a post trial motion for immunity under the Health Care Quality Improvement Act?

4. Whether there is an issue as to whether the Health Care Quality Improvement Act affords "immunity from suit"?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Lehigh Valley Hospital, Inc., is wholly owned by Lehigh Valley Health Network.

TABLE OF CONTENTS

	Page
RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
COUNTER-STATEMENT OF THE CASE	1
Procedural History	1
Factual History	4
REASONS FOR DENYING THE PETITION	13
1. Petitioner did not preserve his argument that the Trial Court cannot withhold from jury consideration the factual basis for the grant of immunity under the Health Care Quality Improvement Act.	13
2. There is no conflict between the Courts of Appeal as to the question of whether immunity under the Health Care Quality Improvement Act is an issue at law to be determined by the Court.	14

Contents

Page

3. The District Court was within its authority to grant a post-trial motion for a finding of immunity under the Health Care Quality Improvement Act. 15

4. There is no issue as to whether the Health Care Quality Improvement Act affords "immunity from suit". 17

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Cases: *Page*

Adams v. Robertson, 520 U.S. 83 (1997) 13

Angelico v. Lehigh Valley Hosp., Inc., 984 F. Supp. 308 (E.D. Pa. 1997) 2

Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268 (3d Cir. 1999) 2

Brader v. Allegheny General Hospital, 167 F.3d 832 (3d Cir. 1999) 15

Brown v. Presbyterian Health Care Services, 101 F.3d 1324 (10th Cir. 1996) 15

Bryan v. James E. Holmes Regional Medical Center, 33 F.3d 1318 (11th Cir. 1994) 16

Singh v. Blue Cross/Blue Shield of Massachusetts, 308 F.3d 25 (2002) 14, 16

Sugarbaker v. SSM Health Care, 190 F.3d 905 (8th Cir. 1999) 15

Toonder v. Lehigh Valley Hospital, 1995 WL 870769, 26 Pa. D&C 4th 488 (1995), *affirmed* 701 A.2d 791 (Pa. Super. 1997) 7, 8

Cited Authorities

Page

United States Constitution:

Seventh Amendment 14

Statutes:

42 U.S.C. § 1983 1

42 U.S.C. § 11111 17

42 U.S.C. § 11112 ..... 12, 13, 15, 17

Rules:

Fed. R. Civ. P. 59 3

Fed. R. Civ. P. 60 3

COUNTER-STATEMENT OF THE CASE

Procedural History

In April of 1996, Petitioner Richard J. Angelico, M.D. ("Dr. Angelico") filed the Complaint in this matter, in which he claimed that the various defendants, three hospitals, Lehigh Valley Hospital, St. Luke's Hospital and Easton Hospital, and two groups of cardiothoracic physicians, conspired to keep him out of the market for cardiothoracic surgery in the Lehigh Valley in violation of sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act. Dr. Angelico also brought, under the doctrine of pendent jurisdiction, state law claims against defendant, Lehigh Valley Hospital, for breach of contract, and against defendant, St. Luke's Hospital, for breach of contract and tortuous interference with existing or prospective contractual relations.

Additionally, the same Complaint also brought antitrust claims and § 1983 due process claims against defendant, Brian Peters, Esquire and his law firm, Post & Schell, P.C. (§ 1983 claims were also brought against Lehigh Valley Hospital). After filing of a motion to dismiss, by Post & Schell, the antitrust counts were voluntarily dismissed by Angelico. On September 13, 1996, the Court sanctioned Petitioner's counsel for bringing these counts against Peters and Post & Schell and necessitating the filing of a motion before withdrawal. The § 1983 claim against Lehigh Valley Hospital was also dismissed because it depended for any viability on the existence of a claim versus Post & Schell. No appeal, involving these issues, was taken.

Following completion of discovery[1] regarding the threshold issues of antitrust standing and antitrust injury, defendants jointly filed a motion for summary judgment on Dr. Angelico's antitrust claims based on his failure to produce sufficient evidence of antitrust standing or injury to competition. On October 31, 1997, the district court entered summary judgment for defendants on Dr. Angelico's antitrust claims and declined to exercise supplemental jurisdiction over his state law claims. *Angelico v. Lehigh Valley Hosp., Inc.*, 984 F. Supp. 308 (E.D. Pa. 1997).

Dr. Angelico appealed the district court's ruling to the Third Circuit Court, which reversed the district court's ruling on the issue of standing and remanded to the district court for further proceedings. *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268 (3d Cir. 1999).

On remand, the district court re-opened discovery, permitting full discovery on all issues. Plaintiff availed himself of this discovery fully. Following the close of discovery, defendants again moved both jointly and individually, for summary judgment, on the anti-trust and state law claims. Lehigh Valley Hospital also moved for a grant of immunity under the Health Care Quality Improvement Act (H.C.Q.I.A.). The other two hospital defendants had not rejected Dr. Angelico's application under the provisions of the H.C.Q.I.A. The district court denied these motions, and the case proceeded to trial before a jury.

---

1. Discovery was limited only to the issues of antitrust standing, injury and geographic and product markets, pursuant to a limited discovery order issued by the Court.

Following a six week jury trial in February and March of 2001 before the Honorable J. Curtis Joyner, the jury returned a defense verdict on all counts, including the pendent state law claims.[2] Dr. Angelico filed a post-trial motion seeking relief from the trial court pursuant to Fed. R. Civ. P. 59 and 60.[3] These Motions were denied.

Lehigh Valley Hospital also renewed its motion for a grant of immunity under the H.C.Q.I.A. Lehigh Valley Hospital's Motion for immunity was granted. Petitioner Dr. Angelico then filed an appeal to the Third Circuit. The anti-trust and state law claims were not pursued on the appeal.

Judgment was fully affirmed by the Third Circuit Court of Appeals and Petitioner's request for a rehearing was denied.

The instant Petition for Writ of Certiorari followed.

---

2. Both at the close of Dr. Angelico's case and again at the close of trial each defendant moved for Judgment as a Matter of Law. Lehigh Valley Hospital renewed its Motions for an immunity determination (N.T. 3/2/01 at 180-215, Appendix at C155-C190; N.T. 3/13/01 at 213-235, Appendix at C210-C232). The court denied these motions pending the jury's verdict. (N.T. 3/2/01 at 215, Appendix at C190; N.T. 3/13/01 at 235, Appendix at C232). These are references to the Reproduced Record filed with the Third Circuit Court of Appeals.

3. Dr. Angelico's trial counsel withdrew from their representation of him following trial. Consequently, Dr. Angelico pursued his motion for post-trial relief, the appeal, and the present Petition for Writ of Certiorari, Pro Se.

Factual History

Plaintiff was a cardiothoracic surgeon. In 1986, Dr. Angelico was looking for work in his specialty of open heart surgery. He wished to become a Medical Staff member at Lehigh Valley Hospital. (T.T. Angelico, February 8, 2001, p. 187 lines 10-22, App. A at 0001-0002). At that time, Lehigh Valley Hospital had a Quality Assurance/Medical and Allied Health Staff Development Plan. That Plan established a limited number of "manpower slots" within particular Hospital departments, including the Department of Cardiothoracic Surgery. To acquire staff privileges, there must be an available "manpower slot". (T.T. Hart, February 16, 2001, p. 10 line 15 through p. 12 line 8, App. A at 0003-0006). When Dr. Angelico started at Lehigh Valley Hospital, there was no "manpower slot" available for him. However, there were "manpower slots" held by groups. One of those groups, which he joined, was the "Khindri" Group. Dr. Angelico thus fit under that group's "manpower slot". Dr. Angelico then left Dr. Khindri and joined another group, Panebianco-Yip, (P.Y.) and was covered under their manpower slot. (T.T. Hart, February 16, 2001, p. 13 lines 7-17, App. A at 0007-0008). That group sent him to St. Luke's Hospital to establish the group at a separate hospital. Thereafter, he was devoting himself full time to St. Luke's Hospital's patients. When, he had built up a practice at St. Luke's Hospital, he left the group that had sent him to establish the group's practice at St. Luke's Hospital. He then maintained a solo practice at St. Luke's Hospital. (T.T. Angelico, February 8, 2001, p. 195 lines 13-20, App. A at 0009-0010). Thereafter, Dr. Angelico admitted heart patients exclusively to St. Luke's Hospital. In January 1991, Dr. Angelico voluntarily requested that his active staff privileges at Lehigh Valley Hospital be reduced to courtesy privileges, which only allow for twelve (12) patient admissions and/or consults, because of his "busy" practice at St. Luke's Hospital. The request was granted.

Dr. Angelico didn't utilize his new courtesy privileges, and did not admit patients at Lehigh Valley Hospital after 1989. (T.T. Angelico, February 12, 2001, p. 147 lines 2-5, App. A at 0011-0012).

Then, after several years, and after he had developed a thriving practice exclusively at St. Luke's Hospital, Dr. Angelico suddenly resigned from the only hospital at which he was practicing his profession. He resigned in March of 1994. (T.T. Angelico, February 9, 2001, p. 35 lines 9-15, App. A at 0013-0014). It was highly unusual for a doctor of any specialty to suddenly announce a resignation and simply walk away.

As of his resignation from St. Luke's, there were no open manpower slots at Lehigh Valley Hospital., for active privileges in cardio thoracic surgery. (T.T. Hart, February 16, 2001, p. 59 lines 9-22, App. A at 0015-0016) and (T.T. Hart, February 20, 2001, p. 45 lines 10-17, App. A at 0017-0018).

Dr. Angelico sought privileges at Easton hospital, but did not receive them. He also attempted to return to St. Luke's but was unsuccessful.

In September of 1994 Dr. Angelico and Dr. Toonder, a cardiothoracic surgeon at Lehigh Valley Hospital, agreed to form a partnership in order to obtain privileges for Dr. Angelico under a manpower slot held by Toonder at Lehigh Valley Hospital (T.T. Hart, February 20, 2001, p. 98 lines 8-24, App. A at 0019-0020).

In October 1994 Dr. Angelico was deemed to have voluntarily relinquished his courtesy staff privileges at Lehigh Valley Hospital by reason of failing to make timely payment

of his medical staff dues. (Plaintiff's Trial Exhibit 41, App. A at 0021-0027). At trial, Lehigh Valley Hospital presented evidence and testimony that Plaintiff received the required first notice of dues and that the second notice was sent ten days before the final due date. (T.T. Hart, February 16, 2001, p. 77 line 9 through p. 83 line 23 , App. A at 0028-0035). Plaintiff admitted he failed to pay his dues when required. (T.T. Angelico, February 12, 2001, p. 93 lines 5-25, App A at 0036-0037). He did try by pre-dating a check within the time limits to avoid his failure, but fortunately, Lehigh Valley Hospital retained the envelope that the check was mailed in.

On November 6, 1994 Dr. Angelico submitted an application to Lehigh Valley Hospital for staff privileges in order to receive the manpower slot which Toonder had been granted. (Plaintiff's Trial Exhibit 43, App. A at 0038-0049). This application triggered the responsibility of the hospital to do its "due diligence" to discover what Dr. Angelico's practice had been since he began working exclusively full time at St. Luke's Hospital.

As part of due diligence, John W. Hart, Vice President for LVH, submitted a letter dated November 10, 1994 to Charles Sanders, Vice President for Medical and Academic Affairs at St. Luke's Hospital, since 1989, St. Luke's Hospital was the only place he had practiced. (Plaintiff's Trial Exhibit 45, App. A at 0050-0051). It is standard procedure to get information of an applicant's most recent job experiences. Both Lehigh Valley Hospital and St. Luke's are avid and active competitors and neither hospital likes the other.

The letter contained a detailed questionnaire. While Dr. Sanders answered the questions in a non-suspicious nature, he then added the following cryptic comment: " *Dr. Angelico resigned from our staff. Only he can provide the reasons for*

his resignation." (*Id.*, emphasis added). This addition, by Sanders raised legitimate concerns.

Thereafter a series of correspondence was instituted by Mr. Hart, between himself, Dr. Saunders and Dr. Angelico, due to the paradoxical nature of St. Luke's Hospital response. This correspondence sought more complete information concerning the reasons for Dr. Angelico's resignation. The question of why the resignation occurred never gets answered satisfactorily. (Exhibits 47, 48, 49, 52, 54, 55, 56, 57, 59, 60, see App. A at 0052-0065).

Lehigh Valley Hospital was attempting to unravel this puzzle, because successful people don't just jump ship without some cause. As has been said "where there is smoke there is fire".[4]

Then on March 18, 1995, Toonder, Dr. Angelico's partner, filed a Petition to Enforce a Settlement Agreement and for Other Equitable Relief, in State Court, asserting Lehigh Valley Hospital was wrongfully refusing to honor the terms of a Settlement Agreement. Toonder demanded, in light of Lehigh Valley Hospital's alleged "delay in reviewing Dr. Angelico's Application," that the Equity Court order Lehigh Valley Hospital to fully and fairly review and act upon the credentials of Dr. Angelico. . . ." *Toonder v. Lehigh Valley Hospital*, 1995 WL 870769, 26 Pa. D&C 4th 488 (1995), *affirmed* 701 A.2d 791 (Pa. Super. 1997).

On March 21, 1995, Mr. Hart, because the hospital was acting in good faith, despite Toonder's allegations, and still not having any satisfactory explanation from either

4. Loosely quoted from John Heywood's proverbs.

Dr. Sanders or Dr. Angelico, considered Plaintiff's application for full staff privileges to be as complete as possible under the circumstances. The application, despite the flaws, was submitted to the Credentialing Committee in April of 1995. (T.T. Hart, February 16, 2001, p. 155 lines 2-22, App A at 0067-0068). Credentialing is the first committee that considers the application. Approval by this committee does not grant privileges, it merely moves the application to the next stage, therefore, there was still an opportunity to find out what really happened at St. Luke's.

In April of 1995, Credentialing, based upon the then available information, approved Dr. Angelico's application for full staff privileges. It was then to be submitted to the Medical Executive Committee, which was meeting in May of 1995. (T.T. Hart, February 16, 2001, pp. 157 lines 7-21, App. A at 0069-0070).

During the intervening time period between the conclusion of the preliminary injunction hearings in State Court on April 18th and 19th of 1995, and the final hearing scheduled for July 5, 1995, in the *Toonder* matter, counsel for Lehigh Valley Hospital issued several deposition subpoenas to witnesses from St. Luke's Hospital to find out what Dr. Angelico's actual record was at that hospital. The witnesses were ordered to bring with them to the depositions a large variety of documentation concerning Dr. Angelico. The witnesses subpoenaed to these depositions were all associated with Dr. Angelico at St. Luke's Hospital. They included the Chairman and Chief of the Department of Surgery at St. Luke's Hospital (Plaintiff's Trial Exhibit 67, App. A at 0071-0074); the Vice President of Medical/ Academic Affairs for St. Luke's Hospital (Plaintiff's Trial Exhibit 66, App. A at 0075-0078); the Vice President of

Patient Care Services at St. Luke's Hospital (Plaintiff's Trial Exhibit 69, App. A at 0079-0081); and two perfusionists[5], one of whom was the Chief Perfusionist at St. Luke's Hospital and the other perfusionist was associated with Dr. Angelico's, "one incident". (Plaintiff's Trial Exhibit 68, App. A at 0082-0084)[6].

St. Luke's Hospital did not voluntarily comply. Their lawyers fought bitterly against the production, and objected to the depositions. Nevertheless, the Court overruled most of their objections and material was produced and depositions were taken. (T.T. Angelico, February 12, 2001, p. 25 line 3 through p. 27 line 17 App. A at 0085-0088).

Dr. Angelico reviewed all of the subpoenaed documents at St. Luke's Hospital *before* Lehigh Valley Hospital ever saw them. He also attended the depositions of all five witnesses. He assisted counsel in the cross-examination of the witnesses.

This information obtained through discovery, referred to incidents involving nurses and technicians; dating back to March of 1988. It demonstrated that Dr. Angelico had been rude, abusive and insensitive. This well documented history of Dr. Angelico's disruptive behavior at St. Luke's Hospital, none of which was disclosed before discovery, amply justified

---

5. In open heart surgery, the heart lung machine is used to by-pass the heart while the heart is stopped for the necessary repairs. The operators of the machine, who are an integral part of the surgical team, are called "perfusionists."

6. The Chief of Surgery, the Chief Perfusionist, the Vice President of Medical Affairs, all were called as witnesses at the federal trial.

Lehigh Valley Hospital's cautious, careful and prudent treatment of Dr. Angelico's Application[7].

Before acting upon the information in documents which it obtained in response to the deposition subpoenas, Dr. Angelico was given the opportunity to refute the information contained in the documents. Dr. Angelico availed himself of the opportunity and wrote an extensive response. Thereafter, that response was provided by Dr. Angelico in a letter to Dr. John Castaldo, President of Lehigh Valley Hospital Medical Staff. It attempted a rebuttal of St. Luke's Hospital's information (Plaintiff's Trial Exhibit 74, App. A at 0089-0095), Lehigh Valley Hospital's Medical Executive Committee used the depositions and the reply letter in evaluating the information. Based on this information, the Executive Committee voted to recommend denial of Dr. Angelico's application for staff privileges in June of 1995.

Jumping ahead several steps (Plaintiff's Trial Exhibit 74), Dr. Angelico's response was used at the anti-trust and contract claim trial, and this exhibit in Plaintiff's own words clearly indicated that he was a disruptive physician. Plaintiff called one of the Executive Committee Members, Susan Wiley, M.D., and her testimony on Plaintiff's side of the case, gave the jury a clear picture of why a hospital did not need such a physician on its staff. Disruptive physicians have no place in the modern team oriented hospitals.

Subsequently, Dr. Angelico requested and received a Fair Hearing under the Lehigh Valley Hospital Medical Staff

---

7. At the District Court trial, the Chief Perfusionist referred to events in the operating room as like being part of a reign of terror on Dr. Angelico's part. Other witnesses at the trial also testified along those lines.

Bylaws. The Hearing was requested by Dr. Angelico on June 30, 1995. (Plaintiff's Trial Exhibit 86, App. A at 0096). The appeal hearing was originally scheduled for August 31, 1995, which was two days beyond the sixty (60) days required by the Bylaws. This delay was due in large part to the inability to coordinate the schedules of those members on the appeal hearing panel with those of Plaintiff's three attorneys. However, it is undisputed that Plaintiff was given the opportunity to have his hearing on August 28 and 29, within the sixty (60) day requirement, but he declined to avail himself of these dates. The Fair Hearing subsequently commenced on September 5, 1995, a mere five (5) days later. (Plaintiff's Trial Exhibits 92, 93, 94, 95, 96, 98, App. A at 0097-0107).

Pursuant to the Bylaws (Section II E. 1(c)(2) p. 49, Plaintiff's Trial Exhibit 2, App. A at 0108-0185) Dr. Angelico had the right to object to the composition of the Hearing Panel, and was so apprized of that right when he was notified of the composition of the Hearing Panel and his right to object in a letter dated July 19, 1995 (Plaintiff's Trial Exhibit 87, App. A at 0186-0187). Neither Dr. Angelico nor his attorneys made any objection to the members of the Hearing Panel. Objection will first be made at the trial in District Court and it is repeated in this appeal.

After a lengthy hearing process, taking five (5) nights to complete, (Lehigh Valley Hospital Trial Exhibit 34 A-E, App. A at 0188-0434), the Fair Hearing Panel recommended the denial of Dr. Angelico's application for medical staff privileges on February 6, 1996 (Plaintiff's Trial Exhibit 101, App. A at 0435-0466), and issued a well reasoned report.

Dr. Angelico appealed this decision to the Appellate Review Committee of the Board of Trustees, under Bylaws Section IIIA.1.

Before the Board of Trustees had an opportunity to act, Dr. Angelico brought this Antitrust and related State Claims Action. He also filed a separate State Court Action. (Plaintiff's Trial Exhibit 103, App. A at 0467-0473). On May 14, 1996, the Appellate Review Committee upheld the decision of the Fair Hearing Committee.

Dr. Angelico appealed this decision to the Board of Trustees of Lehigh Valley Hospital. On June 5, 1996, the Board of Trustees of Lehigh Valley Hospital voted to reject the application of Dr. Angelico. (Plaintiff's Trial Exhibit 105, App. A at 0474-0475). After the denial of Dr. Angelico's application for medical staff privileges, Lehigh Valley Hospital, as is required by the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112, *et seq.*, (App. A at 0490) made a report to the National Practitioner's Data Bank. (Plaintiff's Trial Exhibit 108, App. A at 0476-0479).

At the District Court trial, no Member of the Board of Trustees was called. No attempt was made to rebut the presumptions given to the Board of Trustees under the Health Care Quality Improvement Act of having acted fairly.

REASONS FOR DENYING THE PETITION

1. Petitioner did not preserve his argument that the Trial Court cannot withhold from jury consideration the factual basis for the grant of immunity under the Health Care Quality Improvement Act.

The Petition for Writ of Certiorari in this case sets forth the following question, "may a District Court properly withhold from jury consideration whether or not a data bank entry was properly determined by a peer-review process and then subsequent to trial, decide the issue by granting the peer-review body immunity under the Health Care Quality Improvement Act on a post-trial motion?" The only issue related to the grant of immunity presented to the Third Circuit Court of Appeals was "whether the District Court's grant of immunity under the Health Care Quality Improvement Act, despite the failure of Lehigh Valley Hospital to comply with the fairness standards set forth in § 11112(a) of that Act and the requirements of adequate notice and conduct of hearing set forth in § 11112(b), represents a manifest error of law." Petitioner did not previously raise the issue he is now raising before this Court. Like the Petitioner in *Adams v. Robertson*, 520 U.S. 83 (1997), the Petitioner in the case at bar has failed to carry his burden of showing that the claims he raises here were properly presented to the Court below. Accordingly, under the reasoning set forth by this Court in *Adams*, *supra*, his petition for Writ of Certiorari must be dismissed.

2. There is no conflict between the Courts of Appeal as to the question of whether immunity under the Health Care Quality Improvement Act is an issue at law to be determined by the Court.

In the case at bar, the District Court granted a motion for immunity under the Health Care Quality Improvement Act in a post-trial motion. There is no legal authority in any of the circuits that stands for the proposition that the trial court cannot do this.

Petitioner, in his attempt to have his Writ of Certiorari approved by this Court, argues that there is conflict among the appeal courts as to whether a court in a post-summary judgment situation has the authority to rule on the immunity question. In support of this argument, the Petitioner cites *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25 (2002). The petitioner seems to be arguing that *Singh* stands for the proposition that the jury has a right to determine whether a factual basis exists for grant of immunity under the Health Care Quality Improvement Act. *Singh* does not stand for any such proposition. Rather, *Singh* is consistent with all other appellate courts in recognizing that defendant's motions for summary judgment based on immunity under the Health Care Quality Improvement Act, can be determined on a motion for summary judgment. In fact, the First Circuit held in this case that a summary judgment on the basis of immunity under the Health Care Quality Improvement Act did not deprive the plaintiff-physician of his seventh amendment right to a jury trial. What Petitioner fails to appreciate is that *Singh* stands for the proposition that the statutory scheme for immunity under the Health Care Quality Improvement Act only contemplates a role for a jury in an appropriate case, i.e., a factual dispute exists. *Singh* states

that the health care quality immunity determinations *may* be resolved by a jury, not that they must be resolved by a jury simply because it cannot be resolved at the summary judgment stage.

There is no conflict among the courts of appeal in respect to whether a court may, as a matter of law, grant immunity under the Health Care Quality Improvement Act. The courts have uniformly recognized the presumption that exists for immunity and that in order to rebut the presumption, a court asks whether a reasonable jury, viewing all facts in a light most favorable to [the plaintiff], could conclude that he had shown, by a preponderance of the evidence, that [the health care entities] actions fell outside the scope of § 11112(a). *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 912 (8th Cir. 1999); *Brader v. Allegheny General Hospital*, 167 F.3d 832, 839 (3d Cir. 1999); *Brown v. Presbyterian Health Care Services*, 101 F.3d 1324, 1334 n.9 (10th Cir. 1996).

There is no conflict between the Courts of Appeal for the United States Supreme Court to consider and, consistent with the approach taken by all the Appeals Courts, the District Court acted within its authority to grant immunity under the Health Care Quality Improvement Act.

3. The District Court was within its authority to grant a post-trial motion for a finding of immunity under the Health Care Quality Improvement Act.

The issue of immunity under the Health Care Quality Improvement Act is one of law for the Court to decide, in a motion for either summary judgment, for a directed verdict, or for a judgment post-trial, "*whenever the record in a particular case becomes sufficiently developed*", and that

while disputed subsidiary issues of fact pertinent to the immunity might be given to the jury on special interrogatories, "[u]nder no circumstances should the ultimate issue [of Health Care Quality Act Immunity] be submitted to the jury." *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332-1333 (11th Cir. 1994). (emphasis added). The District Court chose to render its determination on the immunity question post-trial. Dr. Angelico had more of an opportunity to develop a record favorable to himself than in any of the other cases in this area which are all decided pre trial.

Clearly, the Petitioner cannot argue that the record in the case had not been sufficiently developed. Petitioner was afforded the opportunity to present his case (much of which he tries to reargue in his Writ of Certiorari) during the course of a six-week jury trial which ultimately led to a defense verdict for all Defendants. In his argument that the District Court was in error in not giving to the jury the question of immunity, he fails to consider the very reason for a jury's role as fact-finder. That is, there must be a genuine issue as to a material fact on the elements of a claim. That is, this articulated basis generally held to support a motion for summary judgment is analogous to the posed question of "whether a reasonable jury, viewing all the facts in a light most favorable to the plaintiff, could conclude that he has shown, by a preponderance of evidence that the defendant's actions fell outside the scope of § 11112(a)?" *Singh* at 33. In the case at bar, there is no factual dispute. Rather, in reviewing Petitioner's argument, you will note that the Petitioner is really objecting to the District Court's legal conclusion that the facts presented through the course of a six-week trial by the Petitioner was insufficient to rebut the presumption of immunity afforded to Defendant Lehigh

Valley Hospital by 42 U.S.C. § 11112(a). There are no genuine issues of fact. For example, there is no dispute as to when a medical staff fair hearing occurred. There is no dispute factually as to who provided testimony during the Petitioner's medical staff fair hearing. Rather, there is a question of law as to whether the deposition transcripts reviewed by the fair hearing should be characterized as witnesses or as documents. The Court found them to be documents. This is a legal, not a factual determination, and one rightly for the Court to make. There is no genuine issue of fact cited by the Petitioner in his Writ of Certiorari that could go to a jury. Using the objective standard as to whether the hospital had followed the provisions of § 11112(a), it is clear that Plaintiff has not re-butted the presumption against him.

4. There is no issue as to whether the Health Care Quality Improvement Act affords "immunity from suit".

Petitioner's final question presented in his Writ of Certiorari for consideration is whether the Court below erred in affirming the District Court's Order declaring Lehigh Valley Hospital immune from suit. It is respectfully submitted that Petitioner simply engaged in a game of semantics and that the District Court's ruling does not suggest that it had fundamentally ignored legal principles otherwise uniformly held, that is, that Health Care Quality Improvement Act's statutory provisions only provide for immunity from money damages. 42 U.S.C. § 11111. The law is clear on this point and it is respectfully submitted that Petitioner simply seeks to create a phantom issue for this Court to consider. There is not, and never has been, any claim for equitable or injunctive relief by Plaintiff. His claim has always been for money damages, trebled in the anti-trust area.

CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD F. STEVENS
Counsel of Record
GLENN GUANOWSKY
Attorneys for Respondent
740 Hamilton Street
Allentown, PA 18101-2488
(610) 439-1451

Supreme Court, U.S.
FILED
JUN - 6 2004
OFFICE OF THE CLERK

No. 03-1594

IN THE

Supreme Court of the United States

RICHARD J. ANGELICO, M.D.

Petitioner

V.

LEHIGH VALLEY HOSPITAL, INC.

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard J. Angelico, MD
Petitioner, Pro Se
2021 Weyhill Drive
Center Valley, PA 18034
(610) 838-2287

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. REASONS FOR GRANTING THE PETITION 1

1. THE ISSUES BEFORE THIS COURT WERE PROPERLY BEFORE THE COURT BELOW 1

2. THE DISAGREEMENT AMONG THE COURTS OF APPEALS ON THE ULTIMATE DETERMINATION OF HCQIA IMMUNITY IN A JURY TRIAL IS MORE THAN IMPLIED, IT IS STATED 4

3. THE USE OF FEDERAL RULE OF CIVIL PROCEDURE 60(b) TO OBTAIN IMMUNITY UNDER HCQIA IS UNPRECEDENTED AND INCONSISTENT WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE RULE 5

4. THE DISTINCTION BETWEEN "IMMUNE FROM DAMAGES" AND "IMMUNE FROM SUIT" IS NOT A "QUESTION OF SEMANTICS" 6

5. WHILE THERE IS NO CONCENSUS AMONG COURTS OF APPEALS ON THE ROLE FOR A JURY IN THE ULTIMATE DETERMINATION OF QUALIFIED IMMUNITY, THE FACTUAL BASIS FOR THAT DETERMINATION MAY NOT BE PROPERLY WITHHELD FROM JURY CONSIDERATION 7

III. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Adams v. Robertson, 520 U.S. 83 (1987) 3
Anderson v. Creighton, 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) 7
Angelico v. LVH et. al., 184 F. 3d 268 (3d Cir. 1999) 10
Angelico v. LVH et. al., 2000 U.S. Lexis 18415, Dec. 7, 2000 9
Angelico v. LVH, Court of Common Pleas of Pennsylvania, CD 1999 (May 25, 2000, slip op.) 10
Apostol v. Landau, 957 F.2d 339 (7th Cir. 1992) 8
Brader v. Allegheny General Hospital, 167 F. 3d 832 (3d Cir. 1999) 3
Brown v. Presbyterian Healthcare Servs., 101 F. 3d 1318 (10th Cir. 1996) 7
Bryan v. James E. Holmes Regional Medical Center, 33 F.3d 1318 (11th Cir. 1994) 4
Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996) 8
Curley v. Klem, 298 F. 3d 271 (3d Cir. 2002) 9
Decker v. IHC Hospitals, Inc., 982 F.2d 433 (10th Cir.1992) 6
Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863 (1994) 7
Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 47 L. Ed. 194, 23 S. Ct. 120 (1902) 9
Fisher v. City of Memphis, 234 F.3d 312 (6th Cir. 2000) 9
Gay v. Petsock, 917 F.2d 768 (3d Cir. 1990) 3
Hunter v. Bryant, 502 U.S. 224, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991) 7
Imperial v. Suburban Hosp. Ass'n, 37 F. 3d 1026 (4th Cir. 1994) 6
Keenan v. Tejeda, 290 F.3d 252 (5th Cir. 2002) 8
Kimberlin v. Quinlan, 339 U.S. App. D.C. 283, 199 F.3d 496 (D.C. Cir. 1999) 8
Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001) 8

Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) 3
Manion v.Evans, 986 F.2d 1036 (6th Cir. 1993) 6
McCoy v. Hernandez, 203 F.3d 371 (5th Cir. 2000) 9
McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 84 L. Ed. 849, 60 S. Ct. 670 (1940) 3
Oliveira v. Mayer, 23 F.3d 642 (2d Cir. 1994) 9
Ortega v. O'Conner, 146 F.3d 1149 (9th Cir. 1998) 9
Salmon v. Schwarz, 948 F.2d 1131 (10th Cir. 1991) 8
Santos v. Gates, 287 F.3d 846 (9th Cir. 2002) 8
Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001) 7
Sharrar v. Felsing, 128 F.3d 810 (3d Cir. 1997) 8
Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997) 8
Tierney v. Davidson, 133 F.3d 189 (2d Cir. 1998) 8
U.S. v. Salerno, 505 U.S. 317 (1992) 6
United States v. *Williams*, 504 U.S. 36, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992) 1, 3
Verizon Communications Inc., et al v. FCC, et al, 535 U.S. 467 (2002) 2
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083,115 L. Ed. 2d 929; 111 S. Ct. 2749 (1991) 2
Warlick v. Cross, 969 F.2d 303 (7th Cir. 1992) 8
Williams v. Pollard, 44 F.3d 433 (6th Cir. 1995) 8
Wilson v. City of Des Moines, Iowa, 293 F.3d 447 (8th Cir. 2002) 8

STATUTES

28 U.S.C .§ 1257 3
42 U.S.C. § 11111(a) 6
42 U.S.C. § 11111(a)(1) 6
42 U.S.C. § 11112(a) 3
42 U.S.C. § 11112(a)(3) 5
42 U.S.C. § 11112(b)(3)(c)(iii) 5

RULES

Fed. R. Civ. Proc. 60(b) 1, 4, 5

Fed. R. Evid. 804(b)(1) 6
Fed.R.Civ.Proc.(60) 3
Supreme Court Rule 14.1(g)(i) 3

ARTICLES

Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U.L. Rev. 1 (1997) 7

BOOKS

Black's Law Dictionary 1476 (6th ed. 1990) 6

I. INTRODUCTION

The decision of the Third Circuit should not be allowed to stand because it 1) improperly and incorrectly suggests that the immunity provisions of the Health Care Quality Improvement Act permit a District Court in a jury trial to withhold from jury consideration the factual questions needed to determine whether or not the requirements for immunity have been met by a health care entity, then decide the issues on its own on post-trial motion; and 2) it affirms a District Court Order which grants "immunity from suit," which even Respondent admits is not available under the Act.

Respondent's Brief in Opposition asks this Court to deny the Petition on the grounds that 1) the issues before this Court were not raised in the Court below; 2) there is no conflict in the Courts of Appeal regarding the ultimate determination of HCQIA immunity; 3) the District Court was "within his authority" to grant immunity on a post-trial FRCP 60(b) motion; and 4) the Order declaring Respondent "immune from suit" is merely a question of "semantics."

Far from asserting grounds to deny the Petition, Respondent has eloquently demonstrated the confusion associated with the immunity provisions of HCQIA, the implementation of which determines the fate of hundreds, if not thousands, of physicians annually.

II. REASONS FOR GRANTING THE PETITION

1. THE ISSUES BEFORE THIS COURT WERE PROPERLY BEFORE THE COURT BELOW

This Court has long held that "[a]ny issue 'pressed or passed upon below' by a federal court, *United States* v. *Williams*, 504 U.S. 36, 41, 118 L. Ed. 2d 352, 112 S. Ct. 1735 (1992) (internal quotation marks omitted), is subject to

this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Communications Inc., et al v. FCC, et al,* 535 U.S. 467, 530 (2002).

> Respondents argue that this issue was not raised below... It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099, n. 8; 115 L. Ed. 2d 929; 111 S. Ct. 2749 (1991) (citations omitted; internal quotation marks omitted)

Respondent has charged "the Petitioner in the case at bar has failed to carry his burden of showing that the claims he raises here were properly presented to the Court below." (Respondent's Brief in Opposition, p.13). This puzzling statement immediately follows a cite to Petitioner's principle brief to the Court below which argued that the District Court's grant of immunity "represents a manifest error of law." (Id.). It further omits the fact that the crucial questions before this Court were not only "passed on" by the Court below, but pressed to it:

> The District Court, conceding to the argument of counsel for Lehigh Valley that it was not a legitimate trial issue, did not permit the validity of that Data Bank entry be put to the Jury (T.T. 3-13-01, pp. 249-254). (Appellant's Petition For Panel Rehearing, Jan. 26, 2004, p.11)

> ...This Honorable Court is petitioned, however, to review not only the verdict slip, but the jury charge in this case (Charge 3-15-01). The fact that is eminently clear is that the 99 pages of that charge contain not one word about the issues presently before this Court. The peer- review process conducted by LVH is nowhere addressed, nor any of the underlying factual issues relating to it mentioned... The District Court granted LVH the extraordinary relief of immunity as a matter of law

> following a jury verdict which in no way addressed the applicable issues, far less the provisions of 42 U.S.C.§11112(a). It is unclear by the order what standard he applied in doing so. But whether it was summary judgment, *Brader*, 167 F. 3d 832, 839, directed verdict, *Gay v. Petsock*, 917 F.2d 768, 771 (3d Cir. 1990), or J.M.O.L. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993), the legal standard would be the same and improperly applied.(FN 7) It is respectfully submitted that the panel has erred in deciding the Court below acted within its "discretion."
>
> (FN 7 - Petitioner has found no precedent for a grant of immunity under Fed.R.Civ.Proc.(60)
>
> (Id., p.13)

As authority for its contention that this Court may not consider the questions before it, Respondent relies on *Adams v. Robertson*, 520 U.S. 83 (1987). (Brief in Opposition, p.13). In *Adams* this Court dismissed a writ of certiorari to a state Supreme Court as improvidently granted where petitioner failed to comply with Supreme Court Rule 14.1(g)(i), holding:

> in reviewing state court judgments under 28 USCS 1257, that the Supreme Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision which the Supreme Court has been asked to review. 520 U.S., at 87.

"Where certiorari is sought to a state court, 'due regard for the appropriate relationship of this Court to state courts,' *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 84 L. Ed. 849, 60 S. Ct. 670 (1940), may suggest greater restraint in applying our 'pressed or passed upon' rule." *U.S. v. Williams*, 504 U.S. 36, n.5 (1992).

Respondent's argument is entirely without foundation and inapplicable to this matter.

2. THE DISAGREEMENT AMONG THE COURTS OF APPEALS ON THE ULTIMATE DETERMINATION OF HCQIA IMMUNITY IN A JURY TRIAL IS MORE THAN IMPLIED, IT IS STATED

Respondent directs this Court to the argument it presented to the District Court in seeking immunity under HCQIA by Fed. R. Civ. Proc. 60(b) motion, which the District Court granted (Pet. App. p.2) and the Court Below affirmed (Pet. App. p. 9). As its authority for the request it cites the 11th Circuit: " '[u]nder no circumstances should the ultimate issue [of Health Care Quality Act Immunity] be submitted to the jury.' " *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1332-1333 (11th Cir. 1994)." (Brief in Opposition, p. 16)

Respondent expounds a theory, embraced by the District Court in this matter and tacitly approved by the Third Circuit by its affirmation, which allows it to make the following statement:

> The Petitioner seems to be arguing that Singh stands for the proposition that the jury has a right to determine whether a factual basis exists for grant of immunity under the Health Care Quality Improvement Act. Singh does not stand for any such proposition.
>
> (Brief in Opposition, p. 14)

However, what the First Circuit in fact said on this matter in rejecting Bryan is:

> [T]he only example Bryan gives of a "disputed subsidiary issue[] of fact" is a HCQIA immunity determination itself: "If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special interrogatories." *Bryan*, 33 F.3d 1318 (emphasis added) (citations omitted). This query is almost identical to the

third HCQIA standard. See 42 U.S.C. § 11112(a)(3) (denying immunity if peer review board fails to give physician "adequate notice and hearing procedures"). Given Bryan's internal inconsistency, and its contradiction of the other circuits' holding that a jury may in principle make a HCQIA immunity determination, we decline to adopt its designation of HCQIA immunity determinations as pure questions of law off limits to a jury. *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc*, 308 F.3d 25, n7 (2002).

3. THE USE OF FEDERAL RULE OF CIVIL PROCEDURE 60(b) TO OBTAIN IMMUNITY UNDER HCQIA IS UNPRECEDENTED AND INCONSISTENT WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE RULE

Petitioner's position on the use of Fed. R. Civ. Proc. 60(b) to seek and obtain immunity under HCQIA is fully briefed in his Petition to this Court. Respondent's statement that "[t]he District Court was within its authority to grant a post-trial motion for a finding of immunity under the Health Care Quality Improvement Act" (Brief in Opposition, p.15) and its subsequent explanation for that statement neither addresses this issue nor cites a single authority which would support such action.

Instead, Respondent proposes that the rationale for the District Court withholding any "disputed subsidiary issues of fact pertinent to the immunity" (Id., p. 16) from the jury was that "[t]here are no genuine issues of fact." (Id., p. 17); and that the District Court found "as a question of law" that deposition transcripts do not comprise witness testimony but are merely "documents"(Id.), in an apparent allusion to the confrontation requirement of 42 U.S.C. § 11112(b)(3)(c)(iii).

It is submitted that there is no such finding of law in the record of this case; had there been, this Honorable Court would have an additional question for review before it.

Without belaboring the underlying facts at issue, "testimony" is defined as "evidence given by a competent witness under oath or affirmation." Black's Law Dictionary 1476 (6th ed. 1990). *U.S. v. Salerno*, 505 U.S. 317, 322 (1992) citing Fed. R. Evid. 804(b)(1) (defining former testimony as: "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law..." *Id.*, n.1.

4. THE DISTINCTION BETWEEN "IMMUNE FROM DAMAGES" AND "IMMUNE FROM SUIT" IS NOT A "QUESTION OF SEMANTICS"

The language of HCQIA does not provide for immunity from suit. Section 11111(a)(1) provides that if a professional review action meets the required reasonableness and due process standards, the peer review participants "shall not be liable in damages." 42 U.S.C. § 11111(a)(1). All Courts of Appeals that have considered the question, save the Court below in the instant action, have held that HCQIA does not afford "immunity from suit." *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433, 435 (10th Cir.1992); *Manion v.Evans*, 986 F.2d 1036, 1042 (6th Cir. 1993); *Singh*, 308 F. 3d 25, 44; *Bryan*, 33 F. 3d 1318, 1382; *Imperial v. Suburban Hosp. Ass'n*, 37 F. 3d 1026, 1031 (4th Cir. 1994).

The District Court declared Lehigh Valley Hospital "immune from suit" (Pet. App. p.2) which was affirmed by the Court below. Respondent is well aware that that ruling, if not reversed by this Court, will have full *res judicata* effect precluding any attempt to challenge the moniker it has placed on Petitioner with its Data Bank entry, which is, indeed, the very reason it sought immunity following its success at trial.

Petitioner did not "create a phantom issue for this Court to consider" nor is this merely a question of "semantics."(Brief in Opposition, p.17)

While Respondent may claim the District Court ruling "does not suggest that it had fundamentally ignored legal

principles otherwise uniformly held," (Id.) it confirms just that; and, standing alone, warrants reversal by this Court.

5. WHILE THERE IS NO CONCENSUS AMONG COURTS OF APPEALS ON THE ROLE FOR A JURY IN THE ULTIMATE DETERMINATION OF QUALIFIED IMMUNITY, THE FACTUAL BASIS FOR THAT DETERMINATION MAY NOT BE PROPERLY WITHHELD FROM JURY CONSIDERATION

The qualified immunity under HCQIA is distinguishable from other forms of qualified immunity in that its language does not afford immunity "not to stand trial." Hence, in any analysis of its applicability it must be recognized that it represents a different entity from one where submission of the matter to trial by jury would render claimed rights "irretrievably lost." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 872 (1994). Indeed, in those cases this Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stages of litigation. *Anderson v. Creighton*, 483 U.S. 635, 646, n.6, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Hunter v. Bryant*, 502 U.S. 224, 227, 116 L. Ed. 2d 589, 112 S. Ct. 534 (1991); *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, at 2156 (2001). HCQIA is not absolute immunity, where entitlement is without regard to the underlying facts. *Brown v. Presbyterian Healthcare Servs.*, 101 F. 3d 1318, n.9 (10th Cir. 1996) cert. den. 514 U.S. 1019 (1995).

Because of its factual nature, qualified immunity is a hybrid form of immunity that presents unique challenges in formulating a meaningful procedural device for its resolution. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U.L. Rev. 1 (1997).

In *Hunter* this Court observed that the issue of immunity should not be routinely submitted to the jury. 502 U.S. at 228. However, the Court did not address the procedure for

deciding the immunity question when the existence of disputed issues of fact precludes disposition on summary judgment.

There is general consensus among all Courts of Appeals on the prohibition of deciding immunity in the presence of disputed historical facts. *Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997); *Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir. 1998); *Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir. 1997); *Knussman v. Maryland*, 272 F.3d 625, 634 (4th Cir. 2001); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002); *Williams v. Pollard*, 44 F.3d 433, 435 (6th Cir. 1995); *Apostol v. Landau*, 957 F.2d 339, 342 (7th Cir. 1992); *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002); *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002); *Salmon v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991); *Cottrell v. Caldwell*, 85 F.3d 1480, 1487-1488 (11th Cir. 1996); *Kimberlin v. Quinlan*, 339 U.S. App. D.C. 283, 199 F.3d 496, 502 (D.C. Cir. 1999).

There is disagreement among the Circuits on whether the ultimate determination of qualified immunity is for the judge or jury to decide. *Swain v. Spinney*, 117 F.3d 1,10 (1st Cir. 1997) (noting that "the ultimate question of whether a reasonable police officer . . . could have believed his actions were in accord with constitutional rights is a question of law, subject to resolution by the judge [and] not the jury"); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996) (noting that "qualified immunity is a legal issue to be decided by the court" and that "jury interrogatories[for disputed factual issues] should not even mention the term"); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992) (stating that the issue of qualified immunity is "a question of law for the court, not a jury question").

However, as noted by the Court below, "other circuits have endorsed an approach that permits a jury to evaluate the objective reasonableness of a defendant's conduct once the participation of a jury has already become necessary for the resolution of disputed factual issues." *Curley v. Klem*, 298 F.

3d 271, 278 (3d Cir. 2002), citing: *Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (finding no error in instructions charging the jury to consider, in a qualified immunity case, whether the defendant's use of deadly force had been objectively reasonable); *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000) (stating that, if the qualified immunity issue is not decided until trial, it "goes to the jury which must then determine the objective reasonableness of the officers' conduct"); *Ortega v. O'Conner*, 146 F.3d 1149, 1156 (9th Cir. 1998) (finding that a district court's submission of the objective reasonableness question to the jury "constituted an appropriate and proper instruction"); *Oliveira v. Mayer*, 23 F.3d 642, 650 (2d Cir. 1994) (holding that a district court "should have let the jury . . . decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law ...").

What is consistent, however, in each and every one of these cases is that, regardless of who ultimately determines immunity, in a jury trial the facts necessary for that determination are for the jury to decide.

The "presumption" under HCQIA in favor of the health care entity determines the initial barrier at summary judgment stage a plaintiff must overcome before the matter may go to trial.

> The statutory presumption at issue here simply adds another element to the plaintiff's case, and hence another issue to be "made as prescribed [before] the right of trial by jury accrues." *Singh*, 308 F.3d 25, n.6 (citing *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320, 47 L. Ed. 194, 23 S. Ct.120 (1902)). "The issue made as prescribed, the right of trial by jury accrues." *Id.*

Petitioner has repeatedly overcome that barrier and rebutted the presumption. *Angelico v. LVH et. al.*, 2000 U.S. Lexis 18415, Dec. 7, 2000; *Angelico v.* LVH, Court of Common

Pleas of Pennsylvania, CD 1999 (May 25, 2000, slip op.); *Angelico v. LVH et. al.*, 184 F. 3d 268 (3d Cir. 1999).

Respondent sought and was granted by the District Court the withholding from jury consideration the factual questions necessary to determine the validity of a Data Bank entry and, ultimately, immunity under HCQIA (T.T. 3-13-01 pp. 249-254, T.T. 3-14-01 pp. 6-10, Pet. App. pp.91-98). It now seeks to justify what it must realize is an egregious departure from normal judicial procedure, tacitly sanctioned by the Court below, by making the ludicrous argument to this Court that "[t]here are no genuine issues of fact." (Brief in Opposition, p.17).

III. CONCLUSION

Respondent hospital alone entails a network of nearly 1000 physicians, many of whom become the subject of peer-review annually. This unfortunate reality is repeated at thousands of hospitals nationally. The broad protections afforded a health care entity under HCQIA clearly invites the potential for abuse. The consequences for physicians who may suffer such abuse, or merely become victims of good faith misapprehension of the due process requirements under HCQIA, require this Honorable Court to use its supervisory authority to impart much needed clarity on its proper implementation.

Respondent's Brief in Opposition, far from presenting cogent arguments to deny the petition, is chilling in its demonstration of the need to grant it. Indeed, Petitioner respectfully suggests that sufficient record is now already before this Honorable Court to warrant summary reversal.

Respectfully Submitted,
Richard J. Angelico, MD
Petitioner, Pro Se
2021 Weyhill Drive
Center Valley, PA 18034
(610) 838-2287